FILED
061201 FEB 20 2007
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE MASON - PETITIONER

vs.

UNITED STATES - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Counsel of Record

Thomas Theophilos
1201 Colvin Blvd
Suite 1
Buffalo, N.Y. 14223
716-447-7899
Attorney for Petitioner

QUESTIONS PRESENTED

Three questions are presented:

1. Whether the Circuit Court erred in failing to reverse the District Court's refusal to grant petitioner's Rule 33 motion on the grounds that newly discovered evidence established that defendant's trial counsel was not informed of certain favors extended to the main witness for the prosecution in return for offering testimony against the defendant.

2. Whether the Circuit Court erred in failing to reverse the District Court's refusal to grant petitioners Rule 33 motion on the grounds that newly discovered evidence established that Gary Edison, the main witness to testify against the defendant at his trial, had committed perjury at that trial.

3. Whether the Circuit Court erred in failing to reverse the District Court's refusal to grant petitioner's Rule 33 motion on the grounds that, after trial, affidavits were procured from three individuals stating that Gary Edison told them that he had falsely implicated Mason in the alleged arson.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF CITED AUTHORITIES.....v

TABLE OF CONTENTS OF THE APPENDIX.....ix

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

STATEMENT OF THE CASE.....1

REASONS FOR ALLOWANCE OF THE WRIT.....6

POINT I

THE MAIN WITNESS FOR THE PROSECUTION WAS OFFERED A DEAL TO HAVE HIS FELONY THEFT CHARGES DISMISSED IN RETURN FOR OFFERING TESTIMONY AGAINST THE DEFENDANT AND DEFENSE COUNSEL WAS NEVER INFORMED OF THIS DEAL.....8

a) Relevant Facts.....8

b) Governing Law.....8

c) Discussion.....12

POINT II

EDISON'S PERJURED TESTIMONY CONSTITUTED NEWLY DISCOVERED BAD ACT EVIDENCE AND THE GOVERNMENT COMMITTED A BRADY VIOLATION BY WITHHOLDING INFORMATION THAT WOULD HAVE EXPOSED THE TESTIMONY AS PERJURIOUS.....16

POINT III

THE DISTRICT COURT ERRED IN REFUSING TO EITHER REVERSE THE CONVICTION OR GRANT A HEARING BASED ON EDISON'S RECANTATION.....19

CONCLUSION.....20

TABLE OF CITED AUTHORITIES

Page

Cases:

Brady v. Maryland,
373 U.S. 83 (1963).....8

Drake v. Portuondo,
321 F. 3d 338 (2d Cir. 2003).....12, 20

Giglio v. United States,
405 U.S. 150 (1972).....9

Grant v. Alldredge,
498 F.2d 376 (2d Cir. 1974).....10

Kyles v. Whitley,
514 U.S. 419 (1995).....9, 10

Leka v. Portuondo,
257 F.3d 89 (2d Cir. 2001).....10, 11, 16

Ortega v. Duncan,
333 F.3d 102, 107 (2d Cir. 2003).....19

Paradise v. CCI Warden,
136 F.3d 331 (2d Cir. 1998).....9

Strickler v. Greene,
527 U.S. 263 (1999).....9

United States v. Antonio Reyes,
1989 WL 99806 (S.D.N.Y 1989).....11

United States v. Agurs,
427 U.S. 97 (1976).....8, 9, 11

United States v. Bagley,
473 U.S. 667 (1985).....9, 10

United States v. Coppa (In re United States),
267 F.3d 132 (2d Cir 2001).....9, 10

United States v. Cruz,
602 F. Supp. 825 (S.D., N.Y. 1985).....11

United States v. DiPaolo,
835 F.2d 46 (2d Cir. 1987).....12

United States v. Helmsley,
985 F. 2d 1202 (2d Cir. 1993).....11

United States v. Imran,
964 F.2d 1313 (2d Cir. 1992).....11

United States v. Morrell,
524 F.2d 550 (2d Cir. 1975).....9

United States v. Natelli,
553 F.2d 5 (2d Cir. 1977).....11

United States v. Payne,
63 F.3d 1200 (2d Cir. 1995).....8, 9, 10

United States v. Perdomo,
929 F. 2d 967 (3d Cir. 1991).....9, 12

United States v. Petrillo,
821 F.2d 85 (2d Cir 1987).....11

United States v. Provenzano,
615 F.2d 37 (2d Cir 1980).....10

United States v. Risha,
445 F. 3d 298.....14

United States v. Rivalta,
925 F.2d 596 (2d Cir. 1991).....10

United States v. Rivas,
377 F.3d 195 (2d Cir. 2004).....10

United States v. Sasso,
59 F.3d 341 (2d Cir. 1995).....11

United States v. Siddiqi,
959 F.2d 1167 (2d Cir. 1992).....12

Unites States v. Stofsky,
527 F. 2d 237 (2d Cir. 1975).....11

United States v. Vozzella,
124 F.3d 389 (2d Cir. 1997).....10

United States v Wong,
78 F.3d 73 (2d Cir. 1996).....11

United States v. Zagari,
111 F.3d 307 (2d Cir. 1997).....10, 11

TABLE OF CONTENTS TO THE APPENDIX

Circuit Court Decision of October 10, 2006.....1

Circuit Court Decision of November 30, 2006.....6

Affidavits of Fred Gage.....8

Affidavits of David Ferris.....13

Affidavit of David Kapur.....16

Hand written "write up" of A.D.A.
Sharp dated May 22, 2002.....19

Report of Detective Kaminski
dated June 11, 2002.....21

"False Confession Letter", dated July 9, 2002; received by
Broome County Court July 15, 2002.....30

Minutes of State Plea of Gary Edison
held on June 25, 2002.....31

Letter of A.D.A Sharp to Judge Matthews
dated July 19, 2002.....39

Minutes of plea of Gary Edison in federal
court held on July 19, 2002.....42

Proceedings in State court regarding the "False
Confession Letter" held on July 26, 2002.....51

Government memo to defense counsel
dated October 7, 2002.....56

Minutes of Federal Sentence of Gary Edison
held on January 29, 2004.....58

Excerpted portions of trial testimony.....61

Rap Sheet of Gary Edison.....89

Indictment of Bruce Mason.....90

Government's Affidavit in opposition to
defendant's Rule 33 motion.....103

Government's Second Affidavit in opposition
to defendant's Rule 33 motion.....105

Decision of the District Court, dated October
20, 2005, denying defendants Rule 33 motion.....108

Judgment of Conviction of Bruce Mason.....119

Excerpted portion of a decision of the District
Court, dated October 18, 2003.....121

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at United States v. Mason, 201 Fed.Appx. 22 (2d. Cir. 2006).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Second Circuit's opinion was rendered on October 10, 2006. A petition for a rehearing and rehearing enbanc was denied on November 30, 2006.

STATEMENT OF THE CASE

In the case at bar, law enforcement officials agreed to dismiss pending felony theft charges against the prosecution's key witness in return for that witness' willingness to offer testimony implicating the defendant in an alleged arson. This offer of a quid pro quo by law enforcement to the prosecution witness was never divulged to defense counsel. The witness then gave the incriminating testimony at trial and since defense counsel was never made aware of this deal, the witness was not impeached on this issue. The defendant was then convicted of arson in violation of 18 U.S.C. §844(i) and 2, and use of fire to commit a felony in violation of 18 U.S.C §844(h) and 2, as well as several other charges. Several months later, an attorney in good standing swore out an affidavit attesting to the existence of the aforementioned deal. A Rule 33 motion predicated on this affidavit was filed in district court. The prosecution never refuted this affidavit either at the district court level or on

appeal. The district court declined to make findings of fact on the issue. The denial of the Rule 33 motion was appealed to the Second Circuit. The Circuit Court in its opinion ignored this issue completely. Instead it discussed only the second and third questions presented for review in this petition and a fourth issue not included in this petition. Defendant's ultimate objective in presenting this petition is reversal of the arson and use of fire convictions.

The defendant, Bruce Mason was convicted after a bench trial of arson and use of fire to commit a federal felony. At that trial, an individual named Gary Edison, who had previously been employed by Mason, testified that he actually started the fire at the behest of Mason. Mason's defense counsel at that trial argued that the fire was accidental and that neither Edison or Mason had anything to do with it.

Mason's trial commenced on September 23, 2002. Prior to that date, on June 12, 2002, Edison signed a confession statement before Detective Kaminsky and the U.S. Attorney, implicating himself and Mason in the fire (21-29) and entered into a cooperation agreement with the federal prosecutor in which he would plead guilty to arson and offer testimony implicating Mason at his federal trial (Numbers in parentheses refer to page numbers in the appendix). At the time of this agreement, Edison had numerous potential State criminal charges pending against him, including felony thefts amounting to $20,000 from fraudulent credit card purchases, $5,000 to $8,000 in stolen rental receipts, theft of video surveillance equipment, a snow blower theft, and felony forgery charges (16-18; 32; 89).

On June 25, 2002, Edison took a plea in State court to a single count of Grand Larceny with the understanding that he would be sentenced to two to four years. The transcript of this hearing reveals that this plea also covered the numerous other pending criminal offenses (See minutes of Edison's State plea allocution at pages 32-35 of the appendix). The State and

federal prosecutors worked together to ensure that Edison's State and federal prison terms would run concurrently and that Edison would be allowed to serve his time for both offenses in federal custody (34-35; 45-47).

After taking his State plea but before being sentenced on that plea and before taking his plea to the federal arson, Edison wrote a letter, hereinafter referred to as the false confession letter, to Judge Mathews who was presiding over Edison's State proceedings. In that letter, Edison asked the judge to intervene in an injustice being done to him, said that he was insane, required treatment in a mental institution, was easily led, had a memory impairment which caused him to confess to things he didn't do, and stated that he thought he had just made a false confession (30). This letter, however, did not state which legal proceedings or which crime Edison was referring to.

ADA Sharpe, who was prosecuting Edison's State charges, immediately faxed the false confession letter to the Federal prosecutor because he believed it was relevant to Edison's arson confession and could affect his federal plea (39-40; 52).

Two days later, on July 19, 2002, Edison, as part of his cooperation agreement with the U.S. Attorney, pled guilty in federal court to committing arson at the request of Mason (note: the minutes to that plea hearing were later introduced as an exhibit at Mason's trial). Recognizing an obligation to inform the federal judge of the letter, the prosecutor mentioned the letter but did not show a copy of it to the judge. In discussing the letter with the court, the prosecutor said that Edison stated in the letter that he suffered from a memory impairment. He did not, however, inform the judge of Edison's statement that the memory impairment causes him to make false confessions. The judge was also not told about Edison's statements relative to his mental incompetence despite the judge's questions intended to elicit this information (47-50). The prosecutor told the judge that he had spoken to Edison that day and that Edison, in his

letter, was referring to confusion about his State deal (47). The prosecutor then stated that Edison had no problem with his memory in relation to the federal charges (47-48). On questioning from the court Edison confirmed that when he spoke about his memory impairment in the letter, he was referring to his State proceedings (48-49). Less than a week later Edison would give opposing testimony in State court.

Concerned that the false confession letter might be a reference to the plea Edison had taken in State court, Judge Mathews had Edison produced to his court and requested an explanation of the letter. At this State hearing, Edison's attorney assured the judge that the false confession letter was a reference to the federal arson case. Edison in open court and on the record then affirmatively agreed to this statement made by his lawyer, contradicting his earlier testimony in federal court (52).

Mason's trial commenced two months later on September 23, 2002. Two weeks into the trial, on the eve of Edison's testimony against Mason, the federal prosecutor turned over a copy of the false confession letter and Edison's rap sheet to defense counsel (56-57) (It should be noted that the prosecutor had possession of both of these documents well in advance of trial (89; 39-40; 56-57). However, the prosecutor did not tell defense counsel that Edison had testified in State court that the false confession letter was in reference to the federal arson.

When cross-examined at Mason's trial about the false confession letter, Edison changed his testimony again, stating that it was in reference to his State charges, testimony that flatly contradicted his previous testimony at the State hearing (65). Not having been advised of the prior inconsistent statement, defense counsel did not impeach Edison on this issue and the prosecutor never intervened to correct Edison's testimony.

Edison then testified falsely about the terms of his State plea. Edison claimed that this plea only covered his thefts of

equipment (72-78). This testimony is proven false by the transcript of Edison's State plea hearing which clearly shows that all of Edison's pending charges were "wrapped into" his State plea (32-35). The prosecutor failed to correct this highly material perjury, which concealed Edison's motive for testifying falsely against Mason.

Edison also made a number of other false statements at the trial which are discussed in detail in point II of this petition.

Mason was convicted at trial of the arson and use of fire counts. After the trial was over affidavits were obtained from three individuals. Fred Gage (8-9), a business owner and credit counselor, and Dave Ferris (13-14), an elected official, stated in affidavits that they had spoken to Edison in jail on several occasions and that Edison admitted that neither he nor Mason were involved in the fire and that he committed perjury in return for the federal prosecutor's agreement to have the State charges dropped. Gage further stated that Edison said that the prosecutor had coerced him into signing the confession statement in which he implicated Mason and that the prosecutor suborned Edison's perjurious testimony. Gage also stated that Edison said that he was under the influence of drugs when he signed the aforementioned confession and while testifying at court, and that guards had his drugs waiting for him in the van on the way back to jail after testifying (8-11).

Dave Kapur, an attorney in Endicott, N.Y., also swore out an affidavit (16-18). In it, he said that Edison had previously worked for him, maintaining apartments that Kapur owned. Kapur further stated that while acting in that capacity, Edison had committed the $20,000 credit card fraud, rental receipt theft and various equipment thefts. Kapur said Edison told him he spoke with the federal prosecutor and that he was not going to be prosecuted for these crimes because of his involvement in the federal case. Kapur further stated that the police had video evidence of the credit card fraud and that Detective Kaminski said that Edison had signed a written

statement confessing to stealing the rental receipts, but that Kapur's charges were to be dropped in exchange for Edison's testimony in a federal case. Kapur states that he also discussed the issue with A.D.A. Sharp who reiterated what Kaminsky had said (note: at trial, Edison, a career criminal, testified that the credit card fraud was under $1,000 and that he had paid restitution. He testified that he was innocent of the rental receipt theft and denied the existence of the felony forgery. He further testified falsely that "an intense investigation" was still ongoing relative to these charges. He then claimed that Kapur was the one under investigation (72-78). The prosecutor never intervened to correct this blatantly false testimony or tell the court that those charges had already been dismissed as part of Edison's State plea agreement).

The affidavits of all of these aforementioned individuals, along with transcripts of Edison's State court hearings, were submitted to the district court as part of a rule 33 motion. In response to that motion, the prosecutor never submitted an affidavit denying that a deal had been made to drop State charges against Edison in return for offering testimony against Mason. Indeed, the prosecutor never even alleged that he had no knowledge of the existence of such a deal nor did he deny that he had originally pressured Edison into falsely confessing to arson and implicating Mason.

REASONS FOR ALLOWANCE OF THE WRIT

The Circuit Court's decision in this case conflicts with established precedent of the Supreme Court and numerous Circuit Courts. Specifically, in the case at bar, law enforcement officials agreed to dismiss pending felony theft charges against

the prosecution's key witness in return for that witness' willingness to offer testimony implicating the defendant in an alleged arson. This offer of a quid pro quo by law enforcement to the prosecution witness was never divulged to defense counsel. The witness then gave the incriminating testimony at trial and since defense counsel was never made aware of this deal, the witness was not impeached on this issue. An attorney in good standing swore out an affidavit attesting to the existence of the aforementioned deal. The prosecution never refuted this affidavit either at the district court level or on appeal. The district court declined to make findings of fact on the issue and the Circuit Court in its opinion ignored this issue completely and instead rejected the appeal based on other points included in petitioner's brief to that court. (See Hodge v. Hurley, 426 F.3d 368 at 383-84, where the Sixth Circuit spoke critically of a district court's declination to even address a valid legal issue presented in a defendant's habeas petition).

The Circuit Court erred when it failed to reverse the conviction on the grounds that the key prosecution witness' perjured testimony constituted newly discovered bad act evidence, and on the further ground that the government committed a Brady violation by withholding information that would have exposed that perjury.

The Circuit Court erred when it refused to either reverse the conviction or grant a hearing based on the key prosecution witness' recantation.

ARGUMENT

POINT I

THE MAIN WITNESS FOR THE PROSECUTION WAS OFFERED A DEAL TO HAVE HIS FELONY THEFT CHARGES DISMISSED IN RETURN FOR OFFERING TESTIMONY AGAINST THE DEFENDANT AND DEFENSE COUNSEL WAS NEVER INFORMED OF THIS DEAL

a) Relevant facts

The main witness for the prosecution was offered a deal to have his felony theft charges dismissed in return for offering testimony against the defendant and counsel was never informed of this deal.

b) Governing law and standard of review

In *Brady v. Maryland*, 373 U.S. 83,87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also, *United States v. Agurs*, 427 U.S. 97, 110 (1976); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995).

Although *Brady* itself dealt with the prosecution's failure to disclose information that had been specifically requested by the defense, the Supreme Court subsequently held that the government also has a general duty to disclose

information whose exculpatory value is obvious, even when there has been no request. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The government's disclosure obligation also includes the duty to correct false testimony that is given during the trial by government witnesses. *See Paradise v. CCI Warden*, 136 F.3d 331, 338 (2d Cir. 1998)

Material that is "favorable to an accused" includes not only evidence that affirmatively tends to exculpate the defendant, but also information that impeaches the credibility of the government's witnesses. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

The prosecutor is charged with knowledge of the information known to law enforcement officers involved in the investigation or prosecution of the case. *See Kyles v. Whitley*, 514 U.S. 419, 438-39 (1995); *United States v. Morrell*, 524 F.2d 550 (2d Cir. 1975); *United States v. Perdomo*, 929 F. 2d 967, 970 (3d Cir. 1991). Furthermore, the prosecutor has a duty to seek out exculpatory information that is readily available to it. *Perdomo*, supra at 970. Indeed, "non disclosure is inexcusable where the prosecution has not sought out information readily available to it" *Perdomo*, supra at 971. The Supreme Court has held that the *Brady* rule "encompasses evidence known only to police investigators and not to the prosecutor. In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf...." *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

The prosecution's disclosure obligation under *Brady* extends only to information that is "material". *United States v. Agurs*, 427 U.S. 97, 108 (1976); *United States v. Coppa (In re United States)*, 267 F.3d 132,142 (2d Cir 2001); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995). However, courts are much more inclined to consider evidence material where such evidence includes perjured testimony that the prosecution

knew, or should have known about. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976). In this situation, the conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Id.*; *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997).

Where the undisclosed evidence does not show the falsity of evidence offered by the government, the test for materiality is whether "there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The reasonable probability standard is satisfied when the suppression of evidence "undermines confidence in the outcome of the trial." *Id* at 678; *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995). Evidence may be material where it directly supports a defense theory. *See United States v. Rivas*, 377 F.3d 195, 200 (2d Cir. 2004).

Where several pieces of exculpatory information have been suppressed, their materiality must be "considered collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

The issue of whether undisclosed evidence is material is a mixed question of law and fact. *See United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997); *Payne*, 63 F.3d at 1209. Thus, although a finding of the district court as to materiality is "entitled to great weight," *United States v. Provenzano*, 615 F.2d 37, 49 (2d Cir 1980), an appellate court will undertake it's own "independent examination" of the issue. *United States v. Rivalta*, 925 F.2d 596, 597-98 (2d Cir. 1991).

The touchstone for determining the proper timing for the disclosure of *Brady* material is whether the defendant has an opportunity to make effective use of the information at trial. *See Coppa (In re United States)*, 267 F.3d at 135; *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). The failure to make a pretrial disclosure of exculpatory information violates the *Brady* doctrine when it deprives the defense of a reasonable opportunity to investigate the information or otherwise use it

effectively. *See Grant v. Alldredge*, 498 F.2d 376,382 & n.7 (2d Cir. 1974) Furthermore, "a disclosure made on the eve of trial (or after trial has begun) may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." *Leka*, 257 F.3d at 101.

A motion for a new trial is committed to the discretion of the district court, and it's decision will be reversed only for an abuse of discretion. *See United States v. Wong*, 78 F.3d 73,78 (2d Cir. 1996); *United States v. Petrillo*, 821 F.2d 85, 88 (2d Cir 1987). The factual findings of a district court in denying a Rule 33 motion are reviewed for clear error. *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992).

Generally, a defendant seeking a new trial must establish that the newly discovered evidence could not with due diligence have been discovered at or before trial." *United States v. Natelli*, 553 F.2d 5,7 (2d Cir. 1977); *United States v. Zagari*, 111 F.3d 307, 322 (2d Cir. 1997). However, if a government witness has given false testimony and the government knew or should have known that it was false then this due diligence standard is relaxed. *United States v. Cruz*, 602 F. Supp. 825 (S.D., N.Y. 1985); *Unites States v. Stofsky*, 527 F. 2d 237, 243-244 (2d Cir. 1975; *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Helmsley*, 985 F. 2d 1202, 1207 (2d Cir. 1993).

When the failure to discover new evidence stems from deliberate prosecutorial misconduct reversal of the conviction is "virtual[ly] automatic." *United States v. Antonio Reyes*, 1989 WL 99806 (S.D.N.Y 1989) (Unpublished) *citing Stofsky*, supra, 527 F.2d at 243; see also *United States v. Cruz*, 602 F.Supp. 825, 829 (S.D.N.Y.1985).

A district court has discretion in deciding whether to hold an evidentiary hearing in connection with a new trial motion. *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995). Where a new trial motion is based entirely upon a witness recantation, the district judge who observed the witness

testify at trial may "ordinarily" deny the motion without a hearing. *United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir 1987). However, where disputed issues of fact are involved, a hearing is required. *United States v. Siddiqi*, 959 F.2d 1167, 1174 (2d Cir. 1992) (remanding for hearing). *Perdomo*, supra at 973. See also, *Drake v. Portuondo*, 321 F. 3d 338, 345 (2d Cir. 2003) where the court held that where specific allegations before the court "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief" then the court is obligated to hold a hearing.

c) Discussion

The case law from the circuit courts as well as that of the Supreme Court is clear. If a deal is struck to dismiss criminal charges against a cooperating witness in return for that witness' testimony implicating a defendant, then such a deal must be divulged to defense counsel. That is exactly what happened in the case at bar. According to the affidavit of attorney, David Kapur, serious felony charges were not pursued against Edison in return for Edison's agreement to testify against Mason. This is a - - flat out- - Brady violation of the first order. The prosecutor submitted no affidavit to the district court refuting this allegation. In his brief to the circuit court and at oral arguments, the prosecutor again declined to refute these allegations. In short, in the face of these allegation, made by a member of the bar, the response of the prosecutor was a simple "no comment". Attorney Kapur's affidavit alleges that the federal prosecutor knew of the deal at issue. The prosecutor's knowledge and involvement are further corroborated by sworn affidavits from two other credible witnesses. The prosecutor's failure to divulge such information necessarily means that he intentionally covered up this deal. Furthermore, at trial Edison stated that he received no favors in return for his offer to testify and the prosecutor never intervened to correct this lie (63; 68). At the close of evidence and after having withheld the Brady

material, the prosecutor then capitalized on Edison's false testimony, making repeated arguments in his summation that Edison had no motivation to offer false testimony favorable to the prosecution, and that there was no evidence of Edison's motivation other than what he told the court (81-82; 87-88).

At oral arguments on this appeal the prosecutor's only counter to the above arguments was that Mason, in jail and proceeding pro -se in his rule 33 Motion, should have attempted to get an affidavit from the federal prosecutor asking him to admit to an intentional Brady violation. It is evidently the position of the prosecutor's office that no court may find the existence of a Brady violation unless the prosecutor admits to having committed such a violation. This position is utterly untenable and illogical. A lawyer made very specific allegations of a Brady violation. Those allegations went un-rebutted in the district court. Consequently, the pleadings below raised no issue of fact and the rule 33 motion should have been summarily granted on the law. The circuit court's failure to reverse the district court violates clear precedent of the circuit courts and the Supreme Court and as such should itself be reversed.

The prosecutor stated at oral arguments that the Kapur affidavit constituted poor evidence. That contention is absurd. The Kapur affidavit was not sworn out by some drug addict- - it was sworn to by an attorney in good standing. Quite frankly, the evidence simply does not get any better than this. Evidently, the prosecutor is of the belief that an affidavit is not good enough unless Moses himself descends from Mount Sinai to engrave it on stone tablets from the flames of a burning bush. The prosecutor's complaints about the defendant's "poor evidence" is rendered even more insolent by virtue of the fact that he offered no evidence of his own even though he was clearly in a position to offer evidence since the allegations at issue refer to his own actions and thoughts. Like the King of England sitting upon his thrown hurling imperious edicts down to the colonists, the prosecutor takes a position that the actions

of his office cannot be questioned.

The facts are clear. The prosecutor committed an intentional Brady violation and he refused to submit an affidavit refuting those allegations because he knows that if he did such a thing he would be committing perjury and would risk disbarment. The failure of the prosecutor to refute the Kapur, Gage and Ferris allegations amounts to a concession that a Brady violation was committed.

Crediting the Kapur affidavit necessarily means that the Brady violation must have been known to the prosecutor and, therefore, intentional. For it would make no sense for both Detective Kaminsky and A.D.A. Sharp to tell Kapur that a deal had been struck with federal authorities unless federal authorities knew of the deal. Nevertheless, assuming, hypothetically, that the Brady violation was not willful on the part of federal authorities, reversal is still required. For, exculpatory information in the hands of the police is automatically imputed to the prosecutor. This is especially so in the case at bar. Kaminsky was the detective who told Kapur about the deal that was struck to dismiss State charges against Edison in return for the latter's testimony. And Kaminsky was actually present with the federal prosecutor at the time that Edison both signed the statement confessing to the alleged arson and agreed to testify against Mason (21-29; 56-57). Furthermore, recall that the State and federal prosecutors had cooperated regarding the Edison matter to the extent that the two coordinated with each other to insure that Edison's State and federal sentences be served concurrently and in a federal prison (34-35; 45-46). As such, a defacto agency relationship existed between State and federal authorities regarding Mason's prosecution, causing the actions and knowledge of one to be imputed to the other.

In *United States v. Risha*, 445 F. 3d 298, prima facia evidence was presented that State authorities had offered to dismiss certain States charges against a particular individual if

that person in turn offered favorable testimony for the prosecution against a defendant at a federal trial. Evidence of the existence of this offer was circumstantial and there was no direct evidence indicating that the federal authorities even knew that State authorities had even cut a deal with the cooperating witness. The Circuit Court, nevertheless remanded the case for further proceedings to determine whether an agency relationship existed between State and federal authorities such that knowledge of the State offer would be imputed to federal prosecutors. In the case at bar, not only was evidence presented of the existence of an agency relationship between State and federal authorities but evidence was presented that the federal authorities in fact knew that the State had cut a deal with Edison and yet not only was the rule 33 motion dismissed but no hearings were even ordered. Certainly, if the Circuit did not err in failing to reverse the conviction, it unquestionably erred in failing to remand the matter for hearings.

In addition to the aforementioned secret deal, the prosecutor committed another Brady violation. Specifically, when he handed over the false confession letter he failed to also mention that Edison had previously testified that the letter was in reference to Edison's federal confession in which he had implicated Mason in the fire. In short, the letter in combination with Edison's statement at the State hearing taken together amount to an admission by Edison that his arson testimony was a lie. The prosecutor, therefore, basically handed over only half the Brady material with respect to this issue. Furthermore, at Mason's trial, Edison specifically stated that the false confession letter was a reference to his plea on the State charges and the prosecutor never interceded to tell defense counsel that Edison had previously testified that the letter was in reference to the federal arson charge (47-50; 52; 65). Indeed, in his summation the prosecutor reminded the judge that Edison had testified that the false confession letter was in reference to the State charges, not the federal arson plea (88).

Whether this Brady violation was intentional is not wholly discernable from the record but given the prosecutor's other intentional violations an allegation of willful misconduct on this issue is certainly not implausible. The State prosecutor obviously knew of Edison's statement since he was present at the time. That same prosecutor had forwarded the false confession letter to the Federal prosecutor because he believed it was relevant to Edison's arson confession and could effect his federal plea (39-40; 52). Certainly, therefore, one would expect the State prosecutor to inform the Federal prosecutor about Edison's statement that the letter was in fact a reference to the federal charges. Indeed, knowing the serious Brady issue associated with such a statement it would be hard to believe that the State prosecutor would risk censure by intentionally withholding this information from federal authorities. And regardless of whether this violation was intentional it occurred in the presence of a State law enforcement official who had become a defacto agent of federal authorities. Wholly aside from any agency relationship, the federal authorities are charged with knowledge of information in the possession of other law enforcement officials working on the case.

Furthermore, upon the federal prosecutor's receipt of the false confession letter from the State prosecutor, simple diligence obligated the former to ask the latter if Edison had given any explanation for the letter. Failure to ask such an obvious question amounts to wilfull ignorance. Finally, the prosecutor received the letter on July 17, 2002 (39-40) but did not turn it over until October 7, 2002, two weeks after the commencement of Mason's trial (56-57). "Disclosure made on the eve of trial (or after trial has begun) may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." *Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001).

POINT II

EDISON'S PERJURED TESTIMONY CONSTITUTED NEWLY DISCOVERED BAD ACT EVIDENCE AND THE GOVERNMENT COMMITTED A BRADY VIOLATION BY WITHHOLDING INFORMATION THAT WOULD HAVE EXPOSED THE TESTIMONY AS PERJURIOUS

Edison committed numerous discrete acts of perjury when testifying at Mason's trial. At that trial, Edison lied when he said that his State plea only covered charges relevant to his equipment thefts and lied about being innocent of the charges which were secretly dismissed (32-35; 62-63; 72-78). He also lied when he said that Kapur was the one who was under investigation regarding these offenses (73-78). Edison lied when he said that the State plea did not cover a forgery charge (72-78).

Additionally, Edison testified that he had no drug problem (64). However, a note authored by the State prosecutor in Edison's State court file indicated that Edison was a heroin addict, that this was known to the government, and that his statement to the contrary at trial was a lie (19-20). Edison also had a history of mental illness and psychiatric treatment. Not only was this impeachment evidence not disclosed, but when the court asked if there was any such history, Edison's attorney stated that there was not. Edison was obviously aware that this statement was false, yet he remained mute (49-50; 59-60). Edison also lied at trial when he said that the false confession letter related to his State charges (65; 48-49). And he lied when he said that he received no favors in return for testifying against Mason (43-45; 61; 68-69; 81-82). Moreover, the prosecutor knew or should have known that the above testimony by the government's key witness was false at the time he presented this witness.

All of these allegations were included in the rule 33 motion and their veracity was not challenged either at the

district court or on appeal.

This perjured testimony constitutes newly discovered evidence warranting a new trial. The prosecutor countered that these false statements were of marginal value because Edison's credibility was otherwise impeached at trial. However, Edison's testimony relative to the above issues was never impeached. In fact, counsel's attempts to impeach Edison on these issues was obstructed by the government's deliberate suppression of the very evidence needed to impeach it. As such, the government not only suborned Edison's perjury but committed a Brady violation by not providing counsel with the evidence that would have revealed the perjury. Moreover, these particular lies are evidence of perjury committed by the witness during Mason's trial before the trier of fact. As such they constituted a form of impeachment not exposed at trial and, therefore, were not cumulative. Indeed, judges are most sensitive about individuals committing perjury before them. The reason for this is simple. Perjury is not only a crime but when committed under oath before a judge is a contemptuous act against the judge personally. It makes no sense to argue that this kind of bad act evidence is like that normally introduced against cooperating witnesses at trial. Furthermore, certain of the perjured testimony (i.e. the terms of his State deal and false claims of innocence to the charges secretly dismissed) was part of an attempt to cover up the Brady violation addressed in Point I of this petition.

In its decision, the Circuit Court stated that Edison's perjuries were "collateral" to the case at hand and would not contradict the core testimony against Mason. However, this finding is simply not supported by the facts. Edison's testimony was the only direct evidence against Mason. Edison's perjuries were specifically intended to conceal his reason for testifying falsely in the instant case. The prosecutor knowingly allowed Edison to testify falsely and suppressed the evidence which would have proven his testimony false and the judge cited Edison's testimony as central to the guilty verdict. (121).

POINT III

THE DISTRICT COURT ERRED IN REFUSING TO EITHER REVERSE THE CONVICTION OR GRANT A HEARING BASED ON EDISON'S RECANTATION

The affidavits of Gage and Ferris state that Edison recanted his testimony implicating Mason in the fire. However, Edison's recantation was not limited to his and Mason's alleged involvement in the fire. He also recanted his testimony that he received no benefit in exchange for his testimony against the defendant, as well as recanting related testimony as to the reason his crimes against Kapur were not prosecuted. Furthermore, Edison recanted his testimony that he had no drug problem. When deciding Edison's credibility regarding his recantation of the alleged arson one might consider that Edison's other recantations have all been corroborated, not only by the affidavits, but also by transcripts of his State plea hearing and other court documents. It is this witness's trial testimony which has consistently been proven false, not his recantations.

Furthermore, evaluating the validity of a recantation requires the court to consider the truthfulness of that witness's testimony at trial. And the court "must weigh all the evidence of perjury before it, including but not limited to the recantation..." *Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir. 2003). In addition to the affidavits, transcripts and court documents which reveal Edison's perjurious trial testimony, the defendant submitted expert reports which included a fire scene reconstruction and heat causation testing which showed that Edison's arson testimony was not physically possible. These reports further established that the evidence was consistent with a fire accidentally caused by an electrical malfunction.

The district court judge criticized Mason's inability to get a signed statement from Edison recanting his testimony. In the first place, this criticism necessarily presumes that Gage,

Ferris and Kapur lied in their affidavits - - a dubious presumption at best in the absence of an opportunity to view testimony of these individuals at a hearing. In the second place the prosecutor never procured a written affidavit from Edison refuting the affidavits even though Edison was actually in the prosecutor's office to discuss these affidavits. If procuring an affidavit is such a vital aspect of litigating a recantation issue then why was the prosecutor not held to this standard especially since Edison was the prosecutor's witness and presumably on friendly terms with him.

Furthermore, the Gage and Ferris recantation affidavits are corroborated by statements made by Edison's State attorney, which Edison affirmed under oath, that the false confession letter was in reference to Edison's federal arson charges.

Finally, if reversal was not to be granted on this issue, the circuit erred in failing to remand the case for hearings. See *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003).

CONCLUSION

For the reasons stated herein the petition should be granted.

Respectfully submitted

Thomas Theophilos
Counsel for appellant
Bruce Mason
1201 Colvin Blvd.
Buffalo, N.Y. 14223
716-447-7899

APPENDIX

UNTIED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of October, two thousand and six.

PRESENT:

WILFRED FEINBERG
JOSÉ A. CABRANES
ROBERT D. SACK
Circuit Judges

----------x

UNITED STATES OF AMERICA,

Appellee,

v. No. 05-650-cr

BRUCE H. MASON,

Defendant-Appellant.

----------x

APPEARING FOR APPELLANT:

THOMAS THEOPHILOS, Buffalo, NY

APPEARING FOR APPELLEE:

PAUL D. SILVER, Assistant United States Attorney (Glenn T. Suddaby, United States Attorney, *on the brief*), United States Attorney's Office for the Northern District of New York, Albany, NY

Appeal from a judgment of the United States District Court for the Northern District of New York (Thomas J. McAvory, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court be and hereby is **AFFIRMED**.

Defendant-appellant Bruce H. Mason ("defendant") appeals from an order of the District Court denying his motion for a new trial based on newly discovered evidence under Fed. R. Civ. P. 33. We assume the parties' familiarity with the underlying facts and procedural history of the case. Substantially for the reasons stated by the District Court, we affirm.

Following a bench trial, defendant was convicted of, *inter alia*, arson, mail fraud, and use of fire to commit a felony; he was sentenced to a total of 180 months imprisonment. At trial, a government witness and ormer employee of defendant named Gary Edison testified that he had been hired by defendant to set defendant's place of business on fire in order to collect the insurance proceeds. The Government also presented forensic evidence of arson, evidence of defendant's financial circumstances prior to the fire, and evidence that defendant had disabled the alarm at his place of business. Defendant's conviction was affirmed on direct appeal by summary order. *See United States v. Mason*, 118 Fed. App'x544 (2d Cir. 2004). He then filed a Rule 33 motion based on newly discovered evidence that, he claims, could have been used to impeach Edison's testimony or reveals that Edison actually committed

"numerous discrete acts of perjury." The District Court denied the motion and a subsequent motion fo r reconsideration. This appeal followed.

We review the District Court's denial of defendant's motion "for abuse of discretion, upholding findings of fact that were made in the course of deciding the motion[] unless they are clearly erroneous." *United States v. Stewart*, 433 F.3d 273, 295 (2d Cir. 2006). "[E]ven where newly discovered evidence indicates perjury, motions for new trials 'should be granted only with great caution and the most extraordinary circumstances.'" *Id.* at 296 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). We agree with the District Court that the bulk of new evidence presented by defendant, even if it should have been disclosed by the Government and were to reveal that Edison committed perjury, would at most affect Edison's credibility, not contradict the core testimony made against defendant. *See United States v. Wong*, 78 F.3d 73, 82 (2d Cir. 1996) (no new trial required where new evidence of perjury went to a "collateral issue" and was cumulative in any event). Defendant argues that even if the underlying subjects of the perjury were "collateral," the fact that defendant actually committed "numerous discrete acts of perjury" in court might have caused the fact-finder to doubt Edison's testimony altogether. This is not a case, however, where the alleged perjury occurred after the witness "had purportedly undergone a moral transformation and decided to change his ways" so that any evidence of perjury would be so devastating to the witness's credibility as to leave the whole of the testimony in doubt. See *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) (requiring a new trial where the witness lied about gambling). Rather, Edison was impeached on numerous grounds, including his criminal history, lies he had told to law enforcement officials, and admission of medical conditions that he claimed made him prone to false confessions.

We also find no error in the District Court's treatment of affidavits from acquaintances of Edison that claimed he had recanted his testimony implicating defendant in the arson. We

have stated that witness recantations muse be regarded with the "utmost suspicion," *Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir. 2003), and that "[t]he failure of a defendant to produce or explain the absence of an affidavit of a recanting witness may be sufficient grounds for denying a motion for a new trial," *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987). The District Court have defendant ample time to produce an affidavit from Edison and, after considering defendant's explanations for not being able to do so, found these explanations unsatisfactory. Thus, we cannot say that the District Court abused its discretion in refusing to grant a new trial based on the affidavits, or in not holding an evidentiary hearing to ascertain whether defendant actually had recanted. We note as well that the alleged recantation took multiple forms–once denying only defendant's involvement in the arson, once disclaiming any involvement be either Edison or defendant–proving further reason to doubt its credibility. And although we have held that a "court must weigh all the evidence of perjury before it, including but not limited to the recantation" before concluding that no perjury occurred, *Ortega*, 333 F.3d at 107, we repeat that defendant has not submitted new evidence directly contradicting Edison's account of defendant's role in the fire provided at trial.

Finally, we agree with the District Court that the validity *vel non* of a defendant's waiver of a jury trial is not affected by a lack of knowledge regarding evidence that could be used to impeach a witness at trial. *Cf. United States v. Ruiz*, 536 U.S. 622, 629 (2002) (stating, in the context of a plea agreement, that a waiver is "knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances –even though the defendant may not know the *specific detailed* consequences of invoking it").

We have considered defendant's remaining claims and find them to be without merit. Accordingly, for substantially the reasons stated by the District Court, the order is **AFFIRMED**.

FOR THE COURT,
Roseann B. MacKechnie,
Clerk of Court
By S/Lucille Carr

UNITED STATES COURT OF APPEALS
FILED OCT 10 2006
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

UNTIED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	05-6560-cr
Short Title:	USA v. Mason
DC Docket Number:	01-cr-376
DC:	NDNY (BINGHAMTON)
DC Judge:	Honorable Thomas McAvoy

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of November two thousand six.

United States of America,

Appellee,

v.

Bruce H. Mason,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Bruce H. Mason. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judgment that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: S/Tracy W. Young
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FILED NOV 30 2006
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES

V. AFFIDAVIT OF FRED GAGE

BRUCE MASON,

Defendant

STATE OF NEW YORK)
COUNTY OF OWEGO)

FRED GAGE being duly sworn deposes and says that:

1. On several occasions in the later part of 2003 and the early part of 2004, I had conversations with Gary Edison in which he stated the following things to me with respect to the arson that he pled guilty to and of which Bruce Mason was convicted.

2. Initially, Edison said that the reason that he implicated Bruce in starting the fire was because he was angry at Bruce for having given him paychecks that bounced, and that he was jealous of Bruce because he had a beautiful wife and family. Subsequently, Edison then said that he went into the building and attempted to burn the building, but that upon exiting the building the fire did not seem to catch. In a later conversation, Edison admitted that neither he nor Bruce had anything to do with starting the fire. Specifically, Edison said that Winchel won an award for his investigation of an arson that neither he nor Bruce committed. He also said that he and Bruce both had ironclad alibis since Bruce was out of town and he (Edison) was with someone else at the time of the fire. At the end of the last conversations that I had with Edison, he also told me in sum and substance that "If I had just told the truth, Bruce would be free."

3. Edison stated that A.U.S.A. Dooley wrote his confession statement respecting the arson, and that when Dooley gave it to

Edison to sign, Edison refused to sign it because it was not true. The statement was presented to him a second time and he again refused to sign it, and the third time it was presented to him, he signed it even though it was false because his willpower was compromised by the drugs that he was then on and because the prosecutor had placed him under duress. Edison told me that he would say anything on the witness stand just to alleviate the stress and anxiety of testifying publicly, and that he has a social disorder in which he'll say anything just to relieve stress and pressure. Edison then stated that if I continued to dig into this matter that Dooley would have me audited by the I.R.S. He then said that you can't beat the system, you can't beat Dooley -- he's all powerful. Edison then said that the prosecutor won't bring him up on perjury charges because doing that would also implicate the prosecutor in perjury charges.

4. Edison stated that neither he nor Bruce committed the arson, but that Edison confessed to committing the crime because it was part of a deal that he struck with the prosecutor to avoid being prosecuted for crimes that he had committed against David Kapur.

5. Edison stated that while at the crime scene with investigators, he pointed out a broken window that could have been used by an arsonist to gain entry to the building and that A.U.S.A. Dooley then told Edison not to bring that issue up.

6. Edison also said that he was under the influence of drugs when he testified at Bruce's trial. He said that he did not take any drugs the morning of his testimony at the direction of guards who were detaining him in custody, but as soon as he was done testifying, the guards gave him drugs while he was in the van on the way back to prison. He further stated that he had taken drugs the day before testifying. He specifically listed the names of several drugs to me that he was taking, and indicated that they included painkillers and mood-altering drugs.

S/Fred Gage
Fred Gage

Sworn to before me
this 2nd day of January, 2005

S/Dean A. Morgan
Notary Public
DEAN A. MORGAN
Notary Public, State of New York
No. 4683595
Qualified in Tioga County
Commission Expires Nov. 30, 2006

AFFIDAVIT

September 12, 2005

I, Fred Gage, met Bruce and Judy Mason while working at Confidential Financial Services in Owego, NY.

The Masons had retained my services to help in solving some financial difficulties and to work out a payment plan for their taxes.

Bruce Mason referred Gary Edison to me for help with a financial situation. It was during this time that I build a professional relationship with Gary Edison.

While Gary Edison was incarcerated in the Tioga County Jail, he wanted to meet with me. When I met with Gary Edison in the Vistor's Room of the Tioga County Jail, he expressed concern that Dooley was going to renig on the promise that the state charges would be dropped. Gary Edison was also concerned because he had nothing in writing to verify the deal that he and Dooley had made.

The meetings with Gary Edison happened on 11/29/03 and 1/25/04. These meeting were conducted in the presence of guards and Edison was free to leave at anytime.

S/Fred Gage 9/15/05
Fred Gage Date

S/Candace F. Cerretani 9/15/2005
CANDACE F. CERRETANI
Notary Public, State of New York
Reg. No. 01CE5067816
Qualified in Tioga County

Commission Expires Oct. 28, 2006

AFFIDAVIT

October 4, 2005

I, Fred Gage, residing at 186 Front Street, Owego, NY 13827, attempted to contact Gary Edison at his last known address on October 3, 2005.

When I arrived at Gary Edison's home in Binghamton, NY, I was greeted by a woman whom did not identify herself. I introduced myself and ask if I could see Gary Edison. I was told that he (Gary Edison) had nothing to say to me and she slammed the door.

Sincerely,

S/Fred Gage 10/4/05

Fred Gage Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES

AFFIDAVIT

vs. Docket #3:01-CR-00376-001

BRUCE MASON,

Defendant

STATE OF NEW YORK)

David Ferris being duly sworn deposes and says that:

1. I am the Highway Superintendent for the Town of Owego and have served in that capacity for over 20 years.

2. In the early part of 2004, I was present for a conversation between Fred Gage and Gary Edison. The conversation centered around a fire at a building that resulted in an individual named Bruce Mason being charged with arson.

3. At this conversation Edison said that he and Bruce both had iron clad alibis since Bruce was out of town and he (Edison) was with someone else at the time of the fire. Edison also said in sum and substance that "If I had just told the truth, Bruce would be free". Edison also stated that neither he nor Mason committed the arson but that he confessed to committing the crime because it was part of a deal that he struck with the prosecutor in order to avoid being prosecuted for the crimes that he had committed against David Kapur.

S/David Ferris
David Ferris

Sworn to before me this
21st day of January, 2005

S/Dean A. Morgan
NOTARY
DEAN A. MORGAN
Notary Public, State of New York
No. 4683595
Qualified in Tioga County
Commission Expires Nov. 30, 2006

AFFIDAVIT

September 12, 2005

I, David Ferris, at the request of Fred Gage, attended a meeting in the Visitors Room of the Tioga County Jail, between Gary Edison and Fred Gage. I had no prior knowledge of nor had ever me Gary Edison prior to the meeting. It should also be known that I, David Ferris, have had no contact since.

I, David Ferris, had met Bruce Mason in excess of twenty-five (25) years ago, but had not relationship with him, and had no contact with him over the continuing years.

I simply went to this meeting with Gary Edison at the request of Fred Gage.

S/David Ferris 9/15/05
David Ferris Date

Sworn to before me this
15th day of September, 2005

S/Diane Stephens
DIANE STEPHENS
Notary Public, State of New York
Reg. No. 4948686
Qualified in Tioga County
Commission Expires March 20, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES

ATTORNEY AFFIDAVIT

vs. Docket #3:01-CR-00376-001

BRUCE MASON,

Defendant

STATE OF NEW YORK)

David Kapur being duly sworn deposes and says that:

1. I am an attorney licensed to practice law in the states of New York and Pennsylvania.

2. I know an individual by the name of Gary Edison. I learned through news reports that he gave testimony implicating an individual named Bruce Mason at a federal arson trial.

3. In exchange for reduced rentals at an apartment complex that I owned, Edison performed janitorial duties and handled telephone calls from prospective tenants and handled calls from existing tenants regarding repairs to rental properties. Edison then took it upon himself to collect rental payments and forward them to me. Because of the convenience, I acquiesced in this procedure. However, over a period of time, in the process of making these collections, Edison stole between five and eight thousand dollars from me. Edison admitted this theft in front of me and two police officers, one of whom was named Det. Kaminsky. Kaminsky later told me that Edison signed a written confession regarding this theft of money.

4. While he was performed janitorial duties, I also gave Edison a credit card so that he could purchase items necessary to the maintenance of my properties. Edison, instead, used that credit card for personal purchases unrelated to his duties with me and in the process bilked me of approximately $20,000. Lowe's department store had a video of Edison making improper purchases and I made the police aware of this video. Edison also stole from me a snow blower and video surveillance system.

5. I have repeatedly contacted police and the Broome County District Attorney's office and told them that I wanted to press charges against Edison. To this end, I filled out various police reports and provided authorities with written sworn statements regarding Edison's conduct. To date authorities have refused to proffer any criminal charges. In conversations that I had with Detective Kominsky and ADA Sharp, they both said in sum and substance that "the police were not going to pursue my case against Edison because Edison had cut a deal with authorities in which my charges against Edison would be dropped in return for Edison's testimony in some federal case".

6. I also recall that prior to Mason's trial that Edison had told me that he had spoken with A.U.S.A. Kevin Dooley. Edison also tole me that he was not going to be prosecuted for crimes that he committed against me because of his involvement in some federal prosecution. Additionally, after Edison was arrested on check charges, an individual named Allen Reynolds showed me letters written to him by Edison in which Edison stated that the police were going to decline prosecution against Edison for crimes committed against me in return for Edison's testimony in some federal case.

7. Edison never paid me any restitution and he never filed any civil or criminal charges against me.

8. Some time prior to Mason's trial I spoke with A.U.S.A. Kevin Dooley, and informed him of the fact that I had pressed state criminal charges against Edison.

S/David Kapur
David Kapur

Sworn to before me this
9th day of February, 2005

S/Kathleen H. Allis

KATHLEEN H. ALLIS
NEW YORK NOTARY PUBLIC
RESIDING IN BROOME COUNTY
COMMISSION EXPIRES 10/15/2006
REGISTRATION NO. 6081866

BROOME COUNTY COURT
INDIVIDUAL ASSIGNMENT SYSTEM - 203

Date of Request: 5-22-02

SCI Number: _____ (If known)

Defendant Name: Gary M. Edison

Date of Birth: 4-3-49 (If known)

NYSID Number: 3994494Q (If known)

Charges: Grand Larceny 4th Degree
(2 counts)

Co-Defendants:

Date of Arrest: 1-16-02 (If known)

(Illegible)/Court (Illegible)/Number: _____ (If known)

Defense Counsel Jim Mack (If known)

Please assign the matter to a County 'court Judge and advise the People and defense counsel of the Judge to whom this is assigned.

S/Rob Sharpe
DA Representative

For Court Use Only

The matter referenced above is hereby assigned to:

_X_ Hon. Patrick H. Mathews (Fax 6133)
___ Hon. Martin E. Smith (Fax 6135)

TO: COUNTY COURT CHAMBERS _X_
DISTRICT ATTORNEY (FAX 3870) _X_
PUBLIC DEFENDER (FAX 2432) ____
OTHER DEFENSE COUNSEL _X_ 722-2292

From: S/Linda Edwards Date Assigned: 5/22/02
Clerk's Office Representative (Fax 6426)

(Hand written notes)
PG GL 4th
remanded at time of plea
will also PG to Petit Larceny
(Knockdown from other GL 4th in LCC)
D goes to long-term inpatient
rehab (D is heron addict)
(like cornerstore) - if
successfully completes, People will
dismiss felony (otherwise 204 SFO),
if D successfully completes rehab +
People dismiss felony, K will get
3 years probation on misd. plea
in LCC - People will not pursue /charge
other conduct which def can be charged
with → burglary 3d (snow blower) +
GL 4th (stolen rent receipts)
but on misd.
probation def. will
pay restitution
on everything

ENDICOTT POLICE DEPARTMENT
DETECTIVE DIVISION
Supplementary Report

Complaint: Assistance **Complaint Number: 16-1057**
Suspect(s): Bruce Mason/Gary Edison
Assigned: Detective Kaminsky

June 11, 2002 - Spoke with Assistance U.S. Attorney Kevin DOOLEY and he advised me Gary EDISON left a voice mail message for him on June 10, 2002. The message was in regard to information about an arson fire at a business called Next To Nature. DOOLEY knew that I had contact with EDISON and asked if I could talk with him about the information he had. I advised DOOLEY that I would try to find EDISON and speak with him.

I spoke with EDISON via phone when he called for me and asked him to come in. Once EDISON arrived I told him about my conversation with DOOLEY and his subsequent request. EDISON advised me that a W/M he knows as Bob SMITH worked for Bruce MASON earlier in the year in which the fire occurred and that he only worked there for a few months prior to when the fire was.

EDISON told me that he initially ran into SMITH at a bar in Choconut P.A. EDISON stated that they were aware of each other from work and that SMITH knew EDISON had testified in the case a Federal Grand Jury as did several other former employees.

According to EDISON, SMITH asked what would happen if he could come in and give them the whole case on MASON, inquiring as to whether or not he would receive immunity and

possibly some relocation funds. EDISON claims he told SMITH that he was not sure but would ask around.

EDISON then stated that about two weeks ago he ran into this SMITH subject again while walking through the Endicott Price Chopper lot. They started talking again and at this time SMITH said that MASON had talked to him one day while at the factory and asked how much he would charge to burn the building. According to EDISON, SMITH wanted $5000 up front and another $5000 after the fire was set. The fire was suppose to have occurred in December of 1999 while MASON and his family were out of town in Virginia. According to what SMITH told EDISON he did not do it because he was not sure if he would actually get any money.

EDISON said that SMITH ultimately did set the fire by using lighter fluid and matches. According to what he was told, SMITH set two fires. The first one was in the factory area where the welders had been kept and the second was in the are of the sales office. He said SMITH told him that after setting the fire he locked the door and drove away in his truck.

EDISON said that SMITH had a key to the door and knew the alarm was not working. EDISON also said he remembers a lot of "stuff" being piled on the floor where the fire started in the welding area.

EDISON told me that when he saw SMITH at the Price Chopper, it was about 2 weeks ago and that he was with four or five other people in an old Chevy pickup truck color cream and brown and he believes it had PA plates on it. EDISON said that to locate SMITH he would check in the Choconut, PA area but that SMITH would likely contact him because he knows about where EDISON lives.

EDISON told me it is his belief that SMITH may not have a permanent place to live and may possibly be sleeping outdoors. I asked him for a description of SMITH and what he provided me was very similar to EDISON'S description.

After completing the interview with EDISON, I told him I would relay the notes of the conversation to DOOLEY and that one of us would likely contact him tomorrow.

About twenty minutes after leaving my office I received a voice message from EDISON. He stated that while walking down to the CVS in the Price Chopper plaza he ran into SMITH and told him about our discussion. He said that for a few bucks and a place to stay SMITH would be willing to come in and speak with DOOLEY and I. EDISON also stated that he could locate SMITH if need be.

I spoke with EDISON and told him that I have a call in to DOOLEY and that I could do nothing further until I heard back from him.

Left a brief message for DOOLEY about the meeting I had with EDISON and that I was about 80% sure that EDISON is the one that most likely set the fire and was feeling out what type of deal could be made.

June 12, 2002 - Contacted by DOOLEY and provided him with the information I received from EDISON and why I felt he was the person that actually started the fire. DOOLEY stated he would like to come down and interview EDISON with me if I could locate him.

Det. HOLLERAN and I went to 103 Adams Avenue and located EDISON on the front porch. We told EDISON that we were there on behalf of Judge MILLER who wanted to see him in his

court. This was done because there was a W/M who is unknown to us sitting on the porch with EDISON. We later found out that it is the downstairs neighbor. Once in EDISON'S apartment I told him we were there because DOOLEY wanted to meet with him. EDISON agreed to come down and changed his shirt prior to us leaving.

Once at my office we met with DOOLEY. EDISON started telling DOOLEY that Bob SMITH was willing to come in and talk about the fire but was wondering if there would be any immunity granted. He also stated that the SMITH subject was looking for some money so that he could get a place to stay in the area and some food.

DOOLEY explained there is no immunity and provided an example that there is a form of immunity if you testify at a Grand Jury on the State side but that there is none on the Federal side. DOOLEY also went on and explained the sentencing guidelines followed in Federal Court and that many things get taken into account, such as prior criminal record, work and family background and to what extent the defendant has cooperated with the government. DOOLEY and I told EDISON that he was really putting the cart before the horse and that we would need some more detail as to what was going on before any decisions could be made.

At this point EDISON went through what he had told me on June 11, 2002. EDISON then asked on behalf of SMITH if he would be arrested immediately if he came in and talked about his knowledge of the fire. DOOLEY stated that he was not prepared to have anybody arrested immediately as long as he knew how to make contact and as long as they were truthful about what happened.

I then confronted EDISON with the idea that he was the one

responsible for setting the fire. I told him that both DOOLEY and I feel he was involved and many of the facts he provided about SMITH mirror his situation as well as the description he provided of SMITH.

EDISON then said, "hypothetically if I was involved would I get arrested and locked up today." Both DOOLEY and I told him that since we had a suspicion he was involved we already discussed whether or not he would be arrested today and it was decided he would not. DOOLEY did tell EDISON he would eventually be charged with arson in the future in connection with the case.

I noted the time as 11:32 A.M. when Gary stated to both DOOLEY and I, "I am Bob."

In response to a question by DOOLEY, Edison admitted that he se the fire to benefit MASON and to get money.

In addition to what EDISON told me on the 11th, he said that while MASON was on vacation, he called and discussed with EDISON about the building and if it had burned. EDISON also told us that he used lighter fluid to start the fire and that it was a can he brought from home. He stated that he squirted most of the lighter fluid on the debris in a large plastic industrial style garbage can located in the factory area and then lit it with a match. The remaining lighter fluid was used to ignite the records in the area of the sales office. He stated that he locked up as he left and that he drove from the area in a red Chevrolet Cavalier.

EDISON also stated that MASON had mentioned several times that it would be good if the fire happened where the electrical service comes in so that it would like an accident. Apparently there had been some prior storm damage to the electrical service

and repairs had been made recently. EDISON also stated that MASON told him that there was storage above the ceiling area where blueprints were stored and that if the fire got into there it would really good.

EDISON also told us that MASON had been on him about taking the company computer home and transferring/copying sales records and customer records. After they closed for the day EDISON states he took the computer home when he left work. He stated that he was working on the computer at home when he received a call from MASON asking if he had the computer. EDISON said he told MASON he did and was working on it and that is when MASON said tonight would be a good night, which EDISON took to mean setting the building on fire. EDISON said he drove down to the building and that it was in the area of **10 P.M.** or so to set the fire. He told us that when he went in to set the fire in the sales office area he noticed MASON'S briefcase sitting opened on a counter. According to EDISON this was very unusual, that MASON never goes anyplace without the briefcase. What was even more unusual is that MASON had left before everybody else that day and when he left the briefcase was not there so according to EDISON, MASON must have returned to the building sometime after closing and prior to the fire.

EDISON also told us that he had conversation with MASON about how he would be paid the $10,000, because it would look unusual to see a pay out like that shortly after the business burned. He said that a deal was worked out where they would cover the payment for the fire by commissions to EDISON for cage sales.

After making these admissions EDISON asked what was going to happen. DOOLEY explained that he would be getting a lawyer involved for EDISON and that it was imperative for him

to be completely honest about his involvement, that if he purposely left anything out or lied about any aspect of the case from this point, any credit he might get from the government for cooperating could be diminished or lost if he was caught. EDISON was concerned over his current living arrangement stating that he was in a financial bind that it looked like he was going to be evicted and was unable to secure a new apartment.

I am also aware of some threats of potential harm to EDISON based on some narcotics work he did as a confidential source for the Endicott Police Department.

Based on that information and EDISON'S willingness to cooperate with DOOLEY on the investigation, DOOLEY agreed to research the possibility of some financial assistance for EDISON. DOOLEY stated that he would need to go through the enforcement unit out of Syracuse and that this is unusual but would do what he could.

After clarifying what was going to happen EDISON agreed to provide a written statement. I obtained that statement along with an acknowledgment from EDISON that he voluntarily agreed to come to the station with me, that he was not under arrest at that time, that the government did not enter into any sentencing commitment with him and that no promises were made to him regarding the case.

Refer to the notes and written statement of EDISON for further details.

June 14, 2002 - Per prior arrangement by DOOLEY I met with Pet LAUN from the U.S. Attorney's Office in Syracuse to receive funds, which were allocated to assist EDISON. Arrangements were made for EDISON to be housed at the Endicott Inn at a cost of $110 per week. There was also an

allotment for $10 per day for food. These funds were secured to cover a time period until EDISON receives his July Social Security Disability check at which time he will have his own funds to move to a safer location.

After meeting with LAUN, I returned to the U.S. Attorney's Office in Binghamton and met with AUSA LOVRIC and Sgt. SHEERIN who had transported EDISON from Endicott. At that time EDISON signed paperwork, which explains the reason he is receiving the funds as well as acknowledging that this does not in any way claim to be a witness protection program.

It was also explained to EDISON that I would be controlling the funds and he would have to be meeting with me periodically to receive the $10 per day allotment. I also explained that I would be paying the hotel bill on a weekly basis.

Aside from the paperwork he signed, EDISON was informed by AUSA LOVRIC that he has no authority to do any type of investigative work and that he is not to do anything at all related to any case unless he checks with me or their office and first gains approval.

June 21, 2002 - At DOOLEY'S request I transported EDISON to the U.S. Attorney's Office in Binghamton for a debriefing with DOOLEY and Broome County Fire Investigator Jeff WINCHELL. The debriefing essentially covered what EDISON had already told us about the fire and circumstances leading up to it. The meeting had been set up more or less for WINCHELL to review with EDISON how the fire was set. John MORGAN from the Bureau of Alcohol, Tobacco and Firearms was supposed to attend but was unable to make the meeting.

Prior to that debriefing starting, EDISON was again advised that he was to be charged at some point with the arson, that his

cooperation did not entitle him to an type of immunity but that his complete and utter cooperation would be taken into account under the Federal sentencing guidelines.

Sir:

I am writing you to request your intervention with the injustice being done to me.

Through out my appearances before you and so-called agreements by Attorney James Mack, and the district attorney and others, there were many times I wanted the following problem addressed and never was. So I'm asking as a Judge to so order this to be addressed now.

I suffer from a documented medical condition 2 to be exact.

1) I am memory impaired! To the point of not remembering if I did or did not do what I'm being charged with or whether I may have said I did thing that I don't remember just because someone told me I should. I am very easily lead! Because of this, I'm don't remember why I'm here, sir, or what got me here! I told everyone from Police - to- DA to Mr. Mack, everyone ignored me. I'm not sure of anything at this point.

2) I also suffer from social anxiety disorder - meaning I always scared of everyone and everyplace.

Also - this disorder will make me say I did things when I really didn't, I think I did just that now! It will make me say and agree to things just so I don't have a problem and want to leve and be alons where I'm safe. It gets and is worse add that to a memory impairment I am very unstable and can't understand what happened to me.

I request that I should be placed in the state hospital for evaluation & treatment until they decide I am stable enough to comprehend and understand what if anything I may have or may have not done.

I require treetment not jail. I haven't done anything wrong that I remember, all I'm guilty of is being a mental health patient and not fully sane.

I should be there not here, or you have just locked up a very unsane person - not knowingly. Gary Edison-

STATE OF NEW YORK : SIXTH JUDICIAL DISTRICT
COUNTY COURT : COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK,

INDICTMENT NO.
02-388
-against- SCI ARRAIGNMENT/PLEA
GARY EDISON,
Defendant.

Broome County Courthouse
Binghamton, New York
June 25, 2002

BEFORE: HONORABLE PATRICK H. MATHEWS
County Court Judge

APPEARANCES:

Defendant is present.

For the People:

GERALD F. MOLLEN, ESQ.
Broome County District Attorney
BY: ROBERT A. SHARPE ESQ.,
Senior Assistant District Attorney.

For the Defendant:

JAMES MACK, ESQ.
Assigned Counsel for Defendant.

Reported by: DEBORAH E. THIEL

People v Gary Edison

CLERK OF THE COURT: People of the State of New York against Gary Edison, please approach the bench.

MR. SHARPE: There's a long story here, Judge, we'll have to wait and hear where Jim's at with his client.

MR. MACK: Can I have a few minutes, Judge, maybe?

THE COURT: You want to have a seat right at the first table maybe, gentlemen, and we'll call another case.

(Whereupon case is set aside and later recalled.)

CLERK OF THE COURT: People of the State of New York against Gary Edison, please approach.

THE COURT: Mr. Mack, what's your client's desire today?

MR. MACK: Your Honor, as I understand it, my client by the Superior Court Information was charged with a count of grand larceny fourth. He was facing two counts of grand larceny fourth, a potential burglary third, some additional

rent receipts that could result in a grand larceny fourth, a potential arson that was uncharged. An uncharged grand larceny fourth – let's see, I think I may have written that twice for rent receipts, and he just was arrested on a forgery charge of which I have not been assigned or anything.

THE COURT: As of?

MR. MACK: As of just a couple of days ago. We had a proposed disposition worked out in which my client was to get several additional days to rap up some of his personal affairs knowing that he would be in here today. The understanding was he would be permitted some additional time to wrap up his personal affairs and effects. He has, for example, two animals at his apartment right now. From what I understand the police

gave his key, apartment key to some individual downstairs, but my guy doesn't have confidence that this person will appropriately care for his items and will not remove certain monies and other items that might be of great value to him or at least some value to my client.

MR. SHARPE: Can I speak to –

MR. MACK: I've spoken to the –

MR. SHARPE: Can I have a minute with Mr. Mack and maybe I'll alter my position. Do you have a calendar set for Friday, Judge, or is there nothing set for Friday?

THE COURT: Yeah, there is a calendar.

MR. SHARPE: Morning and afternoon?

THE COURT: Morning right now.

(Whereupon a side-bar conference is held off the record.)

MR. MACK: Thank you, your Honor. I think we may have resolved the outstanding issue. It's my understanding, your Honor, that with a plea to this charge at this point with the understanding that the other potential charges that he would be facing would be wrapped in to this, he's also looking at some federal charges as well, your Honor, that the offer being made would be two to four years concurrent with the federal charges, however, he would be permitted until Friday morning at – we talking 9:00 AM, Judge, was that your idea?

MR. SHARPE: Whatever time the Judge sets is fine.

MR. MACK: With that understanding, your Honor, that my client would sign the felony information to the Superior Court Information and we would proceed. I've advised him, your Honor, of his right to be indicted on this and his various rights in connection with the indictment process.

THE COURT: What is he going to plead to, grand larceny fourth?

MR. SHARPE: That's – as Mr. Mack outlined there are two grand larceny four charges pending. This particular one involves the grand larceny four involves a theft of a video

surveillance system in January of this year. And that's what he'll be pleading guilty to. We originally have worked out a disposition that would have resulted in him going to long-term rehabilitation program. The wrench that proved difficult, Judge, is that he's going to be arrested on a federal charge as Mr. Mack makes reference to; that Mr. Dooley is handling.

THE COURT: What is that charge?

MR. SHARPE: It's a federal arson charge.

MR. MACK: I do not represent him on that charge and I don't practice in federal court but that's my understanding based on the representations of District Attorney which I have no reason to disbelieve.

THE COURT: All right. So now, Mr. Edison, your attorney has handed me a document which it indicates you want to give up your right to have the evidence regarding this you're agreeing to be charged with grand larceny first degree, that's what you want?

THE DEFENDANT: Yes.

THE COURT: You've talked this over with Mr. Mack?

THE DEFENDANT: Yes, sir.

THE COURT: I'll grant that request. At this point you're charged with that crime. You have the right, of course, to have a lawyer represent you at all stages of these proceedings and Mr. Mack will be your attorney. Mr. Mack, are you assigned in this?

MR. MACK: I am assigned, your Honor, yes.

THE COURT: You've received a copy of the Superior Court Information, would you waive a further reading?

MR. MACK: Yes, he would, your Honor. I went through it with my client and we would waive a further reading.

THE COURT: What plea does your client intend today then?

THE DEFENDANT: Guilty.

MR. MACK: At this time, your Honor, he would

plead –

THE COURT: That's with your understanding two to four year to run concurrent to the federal term to take place in the –

MR. MACK: That's correct, your Honor, in satisfaction of the multiple charges.

MR. SHARPE: No, I don't know if it's something we control. One of the things Mr. Dooley – we would consent he serve the time in the federal facility rather than state facility. I don't know who controls that, but we have no objection to that when the time comes.

THE COURT: You want to plead guilty, Mr. Edison?

THE DEFENDANT: Yes.

THE COURT: You understand you're not required to plead guilty, no one can force you to plead guilty. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty today you're going to give up a number of valuable, rights, you'll give up your right to remain silent, your right not to incriminate yourself, and your right to a trial by jury, if you want. At a trial the district attorney would have to call witnesses, introduce evidence and prove you're guilty, beyond a reasonable doubt. All of witnesses against you would be cross-examined by your lawyer, you could call witnesses and you could testify. If you plead guilty you give up all these rights, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Rob, did you give me my copy of this or not?

MR. SHARPE: I'm sorry.

THE COURT: The allegation against you is that on the 8th day of January 2002 you did steal property, video surveillance system, value exceeded $1,000. Do you steal that property, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And you're pleading guilty freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: No one's forced you or pressured you in any way?

THE DEFENDANT: No, sir.

THE COURT: You consider yourself guilty of that stealing that property, is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're satisfied with Mr. Mack as your attorney and the time he's taken to discuss the case with you and the advise he's given you?

THE DEFENDANT: Yes, sir.

THE COURT: All right, I'm willing to accept your offer to plead guilty, regarding the crime of larceny fourth degree, how do you plead?

THE DEFENDANT: Guilty, sir.

THE COURT: Is there an agreement on his release at this point, gentlemen?

MR. SHARPE: Yes, Judge, we consent to his release. We would ask you direct him to appear here sometime Friday with the understanding he'd be remanded. The guilty plea he just entered.

MR. MACK: Judge could there also –

(Whereupon a side-bar conference is held off the record. Defendant is not present.)

THE COURT: I'll direct the Defendant to reappear in this Court on Friday the 28th and that will be at 9:00 in the morning. You'll be released. You've got to be back in this courtroom on Friday, June 28th at 9:00, do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you fail to return, a warrant will issue for your arrest and new charge of bail jumping will file against you and on that charge you can be sent to state prison for four years. Do you understand all this?

THE DEFENDANT: Yes, sir, I do.
THE COURT: All right, fine. I'll see you then.
MR. MACK: Thank you, Judge.
* * *

CERTIFICATION

STATE OF NEW YORK
COUNTY OF BROOME

I, DEBORAH E. THIEL, Senior Court Reporter do certify that the foregoing transcript is a true and accurate transcription of my verbatim stenographic notes made in the above-entitled matter on the above-mentioned date.

S/Deborah E. Thiel
DEBORAH E. THIEL
Senior Court Reporter

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF BROOME
Press Building, 7th Floor
19 Chenango Street, Binghamton, New York 13901

July 19, 2002

Hon. Patrick H. Mathews
Broome County Court
Court Annex, Third Floor
Binghamton, NY 13901

Re: People v. Gary Edison SCI # 02-388

Dear Judge Mathews:

On June 25, 2002 the defendant pled guilty to Grand Larceny Fourth Degree with the understanding that he would be sentenced to two to four years in state prison as a second felony offender and that the sentence would be concurrent with the defendant's federal arson conviction being handled by Assistant United States Attorney Kevin Dooley. Additionally, the People agreed that then Mr. Edison was sentenced on both the state and federal charge that he could serve his time "federally".

Your Honor provided the People with a copy of a letter written by the defendant and sent to the Court. The Court ordered a CPL 730 competency exam, which certainly seemed reasonable considering the content of the letter. We received the letter on July 17, 2002. Mr. Edison was already scheduled to plead guilty to the federal arson charge on July 19, 2002. We immediately faxed a copy of Mr. Edison's letter to Mr. Dooley, believing that the letter and its content would affect the federal plea since the charge was largely based on the defendant's

confession to that crime.

Jim Mack represent Mr. Edison on the state charge and a federal public defender represents him on the federal charge. The plea did, in fact, occur before Judge McAvoy earlier this morning. According to Mr. Dooley there was substantial, detailed inquiry placed on the record so that Judge McAvoy could be satisfied that the defendant had committed the crime, that his confession was legitimate, that he had a specific, thorough recollection of both and that the defendant's letter to your Honor was meritless.

According to Mr. Dooley, Mr. Edison admitted fabricating the substance of the letter to you so that he could be produced in court for clarification of his plea agreement. Mr. Mack apparently had an opportunity to speak to the defendant at length at the jail after the defendant sent the letter to you. The Assistant Federal Public Defender also spoke to the defendant about his federal crime and his letter to you. All parties were apparently satisfied in that the plea did go forward this morning.

We ask that the defendant be produced in Court so that similar inquiry can be made to determine the legitimacy, or lack thereof, of the defendant's letter. If the letter is baseless there may be no need to go forward with the CPL 730 exam. Mr. Dooley indicated his willingness to provide further information to the Court, if necessary.

Also, when this plea agreement was negotiated it was the intention of all parties that Mr. Edison (who is currently in jail) accrue "time" on both the federal and state charges. Mr. Edison was remanded to the Broome County Jail on the state charge on July 2, 2002 (the plea occurred on 6-25 but he was remanded 7-2). Mr. Edison's federal plea took place this

morning. According to Mr. Dooley, because the defendant was already remanded on the state charge he is not presently receiving "credit" on his federal charge, even though he pled guilty to that this morning. To accomplish that Mr. Dooley believes we would have to execute a release of the defendant on the state charge. Mr. Edison would then be held on the federal plea and receive credit for time served on that charge. We could then lodge a detainer warrant on the state charge sometime early next week which in view of the differences between state and federal law would then allow the defendant to receive credit for time served on both charges.

If this is acceptable please execute a release for Mr. Edison on the Grand Larceny Fourth Degree charge but file a detainer warrant on the charge by next Tuesday or Wednesday. If you have any questions or require additional information, please do not hesitate to contact me.

Thank you for your attention to this matter.

Very truly yours,

S/Robert A. Sharpe

Robert A. Sharpe
Assistant District Attorney

RAS/
CC: Jim Mack, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-versus- 02-CR-268

GARY M. EDISON.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, Binghamton, New York, on July 19, 2002, before the HON. THOMAS J. McAVOY, United States District Court Judge, PRESIDING.

APPEARANCES:

FOR THE GOVERNMENT:
US ATTORNEY'S OFFICE
BY: KEVIN P. DOOLEY, AUSA
Binghamton, New York

FOR THE DEFENDANT:

FEDERAL PUBLIC DEFENDER'S OFFICE:
BY: LISA PEEBLES, AFPD
Syracuse, New York

THE CLERK: United States of America versus Gary M. Edison, magistrate number 02-173. May I have the appearance for the government, please?

MR. DOOLEY: Kevin Dooley on behalf of the United States.

MS. PEEBLES: Lisa Peebles on behalf of Gary Edison. Mr. Edison is present.

THE COURT: Would you and Mr. Edison come forward, please, and, Mr. Edison, if you's raise your right hand, please?

(Defendant was duly sworn)

THE COURT: All right. Miss Peebles, as I understand it, this morning your client, Mr. Edison, wishes to waive his right to indictment by a grand jury and enter a plea of guilty to a one count information prepared by the US Attorney's Office?

MS. PEEBLES: That's correct, your Honor.

THE COURT: Mr. Dooley, is that your understanding?

MR. DOOLEY: Yes, it is, your Honor.

THE COURT: All right. Mr. Edison, would you once again please state your full name for us?

THE DEFENDANT: Gary M. Edison.

THE COURT: How old are you?

THE DEFENDANT: I'm 53.

.....THE COURT: Are you satisfied with what Miss Peebles has done for you so far?

THE DEFENDANT: Very Much, yes.

THE COURT: Has Miss Peebles or Mr. Dooley or any public official or anyone made any promises to you that you'd be treated leniently in exchange for your plea of guilty, except what's in your plea agreement?

THE DEFENDANT: No, sir.

.....[T]HE COURT: Are you pleading guilty because you're guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Miss Peebles, please state your background and experience in handling matters of this kind?

MS. PEEBLES: Yes, your Honor. I've been with the Federal Public Defender's Office in the Northern District of New York for almost three years in August. I've handled multiple felony cases, arson cases, drug cases. And I've had the opportunity to explain the guidelines, the statutes and so forth, along with going through plea agreements as well, your Honor.

THE COURT: All right. Approximately how much time have you spent so far defending Mr. Edison in this case?

MS. PEEBLES: Approximately 15 hours between the discovery conferences, going through the materials and conferencing with Mr. Edison.

THE COURT: Okay. Have you had what you believe to be adequate discovery of the government's case?

MS. PEEBLES: Yes, your Honor.

THE COURT: Have you advised your client of his rights, nature of the charges and consequences of pleading guilty?

MS. PEEBLES: Yes, I have, your Honor.

THE COURT: Except what's contained in the plea agreement, have you made any promises or threats to induce him to plead guilty?

MS. PEEBLES: No, your Honor.

THE COURT: Are you satisfied that he's pleading guilty freely and voluntarily with an understanding of the charges and the consequences?

MS. PEEBLES: Yes, I am, your Honor.

THE COURT: Do you know of any defense that he has that would prevail if the case went to trial?

MS. PEEBLES: No, your Honor.

THE COURT: Do you know any reason why he should not plead guilty?

MS. PEEBLES: None at all.

THE COURT: Based on the foregoing the Court will find Mr. Edison pled guilty freely and voluntarily; that he is and was competent to enter such a plea; that he understands the charges against him and the consequences of pleading guilty; that here is and was a basis, in fact, for the Court accepting and entering the plea.

The Court will direct the Probation Department to prepare and submit a presentence report.

The Court will set sentencing for November 20, 2002 at 10:00 AM in Binghamton, New York.

Anything further?

MR. DOOLEY: Judge, a couple of matters, Judge.

THE COURT: Sure.

MR. DOOLEY: It didn't come out earlier during my comments, but Mr. Edison is currently facing a charge in county court in Broome County. He was charged with a grand larceny fourth. He pled guilty to that on June 25 to a Superior Court information and currently is in state custody. He was brought here today on a writ. Although the Court – as you mentioned Mr. Edison is not bound by recommendations that the government make with respect to sentencing. The government was told Mr. Edison and his attorney that with respect to the charges he's facing on the state side with his plea, he was told he would receive a two to four year sentence in state prison. He was told the government will recommend and DA recommend that whatever sentences he receives will be served concurrently.

THE COURT: Who's sentencing first?

MR. DOOLEY: We are going to work that out. We also indicated he would – we would make the recommendation, try to serve it so he would serve his time in a federal facility and Judge Matthews is in agreement with that and doesn't have a

problem with that. So we just have to work out the details on that.

THE COURT: Of course, the state has primary jurisdiction.

MR. DOOLEY: Yes, at this point.

THE COURT: Right, at this point.

MR. DOOLEY: That's one thing I just want – as far as the custody matter, I would ask that the Court at least put on the record that he's being detained in this matter at this time and what we are going to try and do is flip flop the custody, because it's my understanding with the Bureau of Prisons, when somebody's in state custody and they're brought in on a writ, that the – from this point to the time he's sentenced they won't give him credit for federal time because he's considered to be in state custody.

THE COURT: That's my understanding.

MR. DOOLEY: It's my understanding, the Assistant DA has spoken to the judge and they're going to prepare – if he's detained on this charge, they're going to issue – the Judge is going to issue a release to the jail so he's released and then put a detainer warrant on him some time next week because on the state side he will get custody if there's a detainer – is he's in federal custody. The state prison will give him credit for that.

THE COURT: Okay. Well, if that effectively – I don't know if it will. I can't say right now. But if that effectively transfers the custody from state to the federal side, then he'll be given credit on his federal sentence. If it works, like you say it may work, whatever federal sentence I give him concurrent with the state sentence he'll be serving, as soon as that custody is transferred. I think I understand what you're saying. I don't know if I've ever been quite through a procedure that's exactly like this but it sounds to me like it should be applied. Again, of course, I can't speak for the Bureau of Prisons because they've got their own way of doing things.

MR. DOOLEY: The Court is detaining him now on

the federal charge?

THE COURT: Yeah. The Court has no problem.

MR. DOOLEY: The other thing I want to place on the record is that apparently Mr. Edison had some lack of communication with his attorney who is representing him on the state side and as a result of that, when he was placed in custody a couple of weeks ago on the state charge, he ended up writing a letter to Judge Matthews that he wasn't sure why he was there. He had – suffers from memory impairment, etcetera. We've discussed this with Mr. Edison this morning. He's indicated to me and to his attorney first, and then to me, that he was concerned. That it was really an effort to try to get back into court. That he was concerned with not knowing exactly what the deal was in terms of what was happening on the state side and he was doing that in an effort to try and get back into court and clear this up.

I just wanted to put on the record here, Judge, so it's clear on the record that we had discussed this prior to him coming in and entering a plea this morning and that according t him he had no problem with this. He has no problem with his memory or recollection about the event that I described on the record earlier. I just wanted to make that part of the record, Judge.

THE COURT: Well, that letter may be construed as medical incompetency. Do you have anything to say on that topic? The Court can order him transferred to a facility where he'd be examined to look for a finding as to whether or not he's capable of participating in the plea process and the sentencing process. The Court would do that if there's any indication to the Court at all. But if I can hear from you client and you and the prosecutor that really what he was saying when he talked about his memory impairment was relative to the fact that he'd like to get back in front of the judge quick so he can find out what was going to happen to him. I think that speaks volumes about his competency.

MS. PEEBLES: Yes, your Honor. I don't think an evaluation is necessary. I've had conference with Mr. Edison. What had happened, I believe, is that there was a lack of communication between him and his attorney that was representing him on the state matter and because of the lack of communication and the fact that this matter arose, the deal in the state court had changed several times. There was some confusion. He wanted some clarity on the record and that was the basis for sending the letter and for trying in an attempt to get the Court's attention.

I don't believe Mr. Edison's suffering from any type of impairment, incompetency that would prohibit him from understanding what he's doing today in terms of pleading guilty and signing a plea agreement and I don't think that there's any need whatsoever to have him evaluated for competency, your Honor.

THE COURT: Mr. Edison, when you told Judge Matthews in that document that you were having a memory problem, what did you think that that would do in connection with expediting your appearance in court before Judge Matthews?

THE DEFENDANT: I wanted to get back into court. There was some confusion over, as I said, what my understanding was prior to the time I did get into court, into sentencing. It seems confusing. I was understanding one thing, being sentenced and told another. We hadn't talked a whole lot at all and I was pretty upset about that. My main concern was I wanted to get back into court and have Judge Matthews clarify exactly what am I doing here, what was done, what was said because my understanding was one thing and then when to another, then the day they sent me went to another. I didn't really have time to say, hold it here, I don't understand what's going on. I assumed I would see my attorney shortly thereafter. I didn't see him at all. That was my basic principle for that. I wanted to get back into court. I don't understand – am I

missing something? Something went wrong here. This isn't my understanding of what was going on.

THE COURT: So, your memory impairment you spoke about went to the procedure that was going on and what was happening with your plea agreement and potential sentencing?

THE DEFENDANT: Yes, sir.

THE COURT: You haven't been sentenced yet on the state side, have you?

THE DEFENDANT: No, sir.

THE COURT: Mr. Dooley, do you have anything to add?

MR. DOOLEY: Judge, Judge, that during the course of this whole investigation, which I've been involved with for about two-and-a-half years, I've had a number of meetings with Mr. Edison. He was being viewed, although we had some suspicions about his involvement, we were talking to him as a witness. I met with him several times. I've had lengthy conversations with him. He, in fact, testified in the grand jury in this matter over a year ago, and I've never had any indication that he had any type of mental impairment or any type of mental health problems. So that's all I wanted to add for the record.

THE COURT: How about any records that you're aware of in the past, is there any treatment for mental health issues?

MS. PEEBLES: No, your Honor. He does have an anxiety disorder where his hand shakes. He does take medication. He hasn't been getting the medication, that was the other basis for writing the letter, in Tioga County. Has a problem with his shoulder, takes Darvocet for pain. They haven't given him that. He has the anxiety which creates the shaking which also prompted him writing the letter, wanting to try to get the medication for his anxiety and that was also, you know, the anxiety disorder was also mentioned in the letter that was sent to the Court.

THE COURT: Have you been treated for anxiety disorder?

THE DEFENDANT: It's a social anxiety disorder. I'm suppose to be taking medication for it. Whatever the problem is in Tioga County, I haven't been getting it but it's – I just get nervous in crowds.

THE COURT: All right. Let me ask you, what kind of medication were they giving you when they were giving it to you?

THE DEFENDANT: I received Darvocet which covered the pain. I have arthritis in ever major joint, non-union here. The Some was a muscle relaxer which also worked to calm my nerves. Broome County one night I was there, they did give it to me. They moved me to Tioga, they haven't given it to me since.

THE COURT: You're taking a pain reliever and muscle relaxer. You're not taking any psychotropic drug?

THE DEFENDANT: No, sir.

THE COURT: I see nothing here at this proceeding that would indicate to me in any way or fashion that this defendant is not completely comprehending the charges and the consequences and to assist his counsel in defending, to the best of her ability in this case, in any shape, way or manner.

So I'm going to make a finding, as I did originally, that he is competent and if anything comes to my attention between now and sentencing, I'll look at it again. But right now I have no doubt in my mind. That issue is not in doubt.

So with that we'll adjourn this proceeding and see you later.

MS. PEEBLES: Thank you.

STATE OF NEW YORK
COUNTY COURT

SIXTH JUDICIAL DISTRICT
COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

INDICTMENT NO.
02-388

GARY EDISON,
Defendant.

APPEARANCE

Broome County Courthouse
Binghamton, New York 13902
July 26, 2002

BEFORE: HONORABLE PATRICK H. MATHEWS
County Court Judge

APPEARANCES:

Defendant is present.

For the People:

GERALD F. MOLLEN, ESQ.
District Attorney
BY: CHERYL A. MANCINI, ESQ.
ASSISTANT DISTRICT ATTORNEY

For the Defendant:

JAMES MACK, ESQ.

Reported by: CATHERINE A. ANDREWS
Senior Court Reporter

THE CLERK OF THE COURT: The People of the State of New York against Gary Edison, please approach the bench.

THE COURT: All right. This matter is before the Court. I had ordered a 7.30 examination in this case.

As I understand it, Mr. Mack, you are of the opinion that's not needed?

MR. MACK: Well, Judge, I expressed no opinion on it, but the – as I understand it, I spoke to my client and after speaking to my client he wishes to withdraw his letter and his request for the same.

THE COURT: Well, in the letter the – Mr. Edison, you indicate that you had a memory impairment and had problems remembering this event. Is that true?

THE DEFENDANT: It was – I had a medication problem. After I got everything straightened out I talked to Mr. Mack and everything started to fall back in place, yes.

MR. MACK: I believe, your Honor, the memory problem was more related to his federal charges, as well. There was never any expression of that as a concern – as it concerns the state charges. I think Mr. Edison's letter was primarily directed at the federal charges that he has although it doesn't make that very clear.

THE DEFENDANT: Yes, sir.

THE COURT: All right. What's the People's position? I got Mr. Sharpe's letter. You want me at this point in time to release the defendant, is that correct?

MS. MARCINI: Release him and then just remand him so he can book time.

THE COURT: Well, what we will do is release him at this point and time on this charge grand larceny four. As I understand it, he is in federal custody and will be held in federal

custody. He will be going to back to Tioga County.

MS. MANCINI: Although according to Mr. Sharpe he was going to be remanded on this, as well. He will be remanded on the two.

MR. MACK: That's what I believe was to occur. So he would stay in custody but go back to Tioga.

THE COURT: Isn't he being held by federal – under federal authority?

MR. MACK: I think he is.

MS. MANCINI: I think he is, yes.

MR. MACK: That's never been clear to me, Judge. As I understand it I think it was just on the state charges. I don't think the Feds ever held him but –

THE COURT: Do you have any detainers?

A COURT OFFICER: I don't have any paperwork, your Honor.

MR. MACK: The letter –

THE COURT: Well, I mean for me to release him and then remand him does not change anything.

MS. MANCINI: He said you already probably done the release according to his letter. He asked – you already do the release and then –

THE COURT: If I release somebody and they're not being held he would be out.

A COURT OFFICER: Your Honor, Leon is going to contact the jail and check with them if you want to hold up for a second.

MR. MACK: Maybe we can just wait and find out exactly. My client understands he was going to remain in custody, your Honor. We just want to straighten that out, that's all.

THE COURT: All right.

THE DEFENDANT: I guess I can go.

THE COURT: We'll call another case.

MR. MACK: Apparently my client things he was

remanded on the federal charges, but sometimes that can be confusing.

THE COURT: Okay.

MR. MACK: I'm suppose to be in Supreme Court at 9:30.

THE COURT: Off the record.

(Whereupon a discussion was held off the record.)

* * * * *

(Whereupon the case was set aside and duly recalled.)

THE CLERK OF THE COURT: The People of the State of New York against Gary Edison.

THE COURT: Mr. Edison?

THE DEFENDANT: Yes.

THE COURT: Okay. We have confirmed you're being held in federal custody. I will release you on the grand larceny in the fourth degree.

At the request of the prosecutor later today I will be issuing a warrant of arrest which will follow you as a detainer back to Tioga County.

MS. MANCINI: That's remanding him afterwards?

THE COURT: Well, it's – if I – ye. It's what needs to be done.

MS. MANCINI: Okay. Just so Mr. Sharpe is concerned that he would be booking time on the Feds and on the state. That's what his request or his reason for the request he be remanded on the state.

THE COURT: Once the warrant is issued and he's in custody on it he will be getting credit for it.

MS. MANCINI: Thank you.

* * * * *

CERTIFICATION

STATE OF NEW YORK
COUNTY OF BROOME

I, CATHERINE A. ANDREWS, Senior Court Reporter, do certify that the foregoing transcript is a true and accurate transcription of my verbatim stenographic notes made in the above-entitled matter on the above-mentioned date.

S/Catherine A. Andrews
CATHERINE A. ANDREWS
Senior Court Reporter

October 7, 2002

William C. Pelella, Esq.
Suite 700 Centre Plaza
53 Chenango Street
Binghamton, New York 13901

re: United States v. Bruce H. Mason
Ind. No. 01-CR-376

Dear Bill:

On July 22, 2002 I provided you with a copy of Gary Edison's plea and cooperation agreement in connection with this matter. I have also provided you with copies of transcripts of the grand jury testimony of witnesses I intend to call, including Gary Edison. I also recall providing you with other documentation concerning Gary Edison (written statements, reports, etc.), but I cannot find a copy of a cover letter memorializing that fact. Therefore, in anticipation of his testimony this week, I am proving you with copies of the following documents:

1. January 5, 1999 Statement of Gary Edison.

2. February 1, 1999 lead sheet summary of conversation Inv. Jason Ellis had with Gary Edison.

3. February 3, 1999 Statement of Gary Edison.

4. June 12, 2002 Statement of Gary Edison.

5. Report of Endicott Detective Michael Kaminsky

concerning June 12, 2002 statement of Gary Edison. (Note: "Supplementary" refers to the fact that information was added to a prior edition of the report. This is the entire report.).

6. Three pages of handwritten notes of Det. Kaminsky made in connection with his contact with Gary Edison concerning the June 12, 2002 statement.

7. July 9, 2002 letter from Gary Edison to Hon. Patrick H. Mathews, Broome County Court Judge.

8. New York State Division of Criminal Justice Services criminal history of Gary M. Edison , run on July 3, 2002.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

JOSEPH A. PAVONE
UNITED STATES ATTORNEY

By: Kevin P. Dooley
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-versus- 02-CR-268

GARY M. EDISON.
Defendant.

TRANSCRIPT OF SENTENCING PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, 15 Henry Street, Binghamton, New York, on January 29, 2004, before the HON. THOMAS J. McAVOY, United States District Court Judge, PRESIDING.

APPEARANCES:

FOR THE GOVERNMENT:

UNITED STATES ATTORNEY'S OFFICE
JOSEPH PAVONE, UNITED STATES ATTORNEY
BY: KEVIN P. DOOLEY, AUSA
Binghamton, New York

FOR THE DEFENDANT:

FEDERAL PUBLIC DEFENDER'S OFFICE:
BY: LISA PEEBLES, AFPD
Syracuse, , New York

THE CLERK: United States of America versus Gary M. Edison, 2002-CR-268. Please state appearances for the record.

MR. DOOLEY: Kevin Dooley on behalf of the United States. Good morning, your Honor.

THE COURT: Morning, Mr. Dooley.

MISS PEEBLES: Lisa Peebles appearing on behalf of Mr. Gary Edison. Mr. Edison is present. Good morning, your Honor.

THE COURT: Morning, Miss Peebles, how are you?

MISS PEEBLES: Great.

THE COURT: Come forward with Mr. Edison. I have received, of course, and reviewed your sentencing memorandum and also that of the government so I know you're familiar with the content of the presentence report.

Have you had an opportunity to go over that with Mr. Edison?

MISS PEEBLES: I have, your Honor.

THE COURT: Mr. Edison, did you have a chance to read over the presentence investigation report?

THE DEFENDANT: Yes, sir.

THE COURT: And, Miss Peebles, I understand that you have an objection to some of the language in the report?

MISS PEEBLES: Yes, your Honor.

THE COURT: Point that out to me.

MISS PEEBLES: Yes. In the sentencing memorandum, in the section labeled objections, I object to paragraph 47 on page 15 of the report.

THE COURT: Yeah.

MISS PEEBLES: Specifically dealing with the psychiatric evaluation or diagnosis that was contained in the Binghamton Psychiatric Center discharge summary concerning my client and his contact with his step daughter at the time.

THE COURT: You know, the Court has no way of knowing the truth or falsity of that matter. All this is is a quote from the hospital record. It's not something the probation report got – Mr. Edison didn't tell the probation officer about that. It's something an institution might want to be cognizant of if they're deciding on some sort of housing for Mr. Edison. I'll note your objection. I don't think I can change it. It's not something they made up. It's a quote from a hospital record.

MISS PEEBLES: Yes, Judge.

THE COURT: I think you also have – urged me to consider a couple of grounds for departure under 5K-2, and of course the government's going to make it, as I understand, a 5K-1 motion?

MISS PEEBLES: Yes.

.....[T]HE DEFENDANT: Thank you, sir.

MISS PEEBLES: Thank you, your Honor.

THE COURT: Court stands adjourned.

(Court stands adjourned)

CERTIFICATION

I, VICKY A. THELEMAN, RPR, CRR, United States Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic records of the proceedings had in this matter and cause the same to be transcribed; that the foregoing is a true and correct copy of the same and the whole thereof.

S/Vicky A. Theleman
VICKY A. THELEMAN, RPR, CRR
United States Court Reporter
US District Court - NDNY

Dated: April 29, 2004

Q How did you actually go about coming forward initially?

A Well, I wanted to test out the waters. I mentioned to Michael Kaminski, Detective Kaminski in Endicott, that I had run into a person and that they seemed to have some information concerning the fire at Express Wire Products. The person was looking for would there be any considerations given or so forth if he came forward with that information. Even at that time it was no, that nothing could be considered. Nothing could be given.

Q All right. And let me direct your attention to June 12, 2002, and ask you if you recall giving a statement to Detective Kaminski on that day, outlining your involvement in setting the fire?

A Yes, sir, I did.

Q And were you arrested on the day that you gave the statement to Detective Kaminski?

A I don't believe I was arrested that day, no.

Q And, in fact, do you recall at that time what your living situation was in June of this year?

A At that time I was living in an apartment in Endicott. I was having some problems with a case Endicott was dealing with prior to that, and I had to just move a little bit and get away from where I was.

Q And how were you supporting yourself back in June of this year?

A At that time I was on Social Security disability.

Q What is that for?

A I have a dislocated, missing a piece of my clavicle. I have a condition that's an anxiety disorder condition, and a compulsive disorder condition. Degenerative arthritis in all my joints.

Q How much were you receiving per month?

A $634 per month.

Q Did you have some problem with your check that

month?
A Yeah, my check was stolen out of the mailbox.
Q And do you recall receiving some emergency funds from the US Attorney's Office during that time?
A Yes.
Q And how much was that, do you recall?
A I believe it was a couple hundred dollars, I believe.
Q How was it given to you?
A It was actually–put me up with a place to stay for a few days until I could figure out what was going on and get back organized with Social Security.
Q Okay. And how much–were you given any money on a daily basis?
A $5 a day to eat.
Q You indicated earlier in your direct that you had a charge on the state side as well?
A Yes, sir.
Q Do you recall entering a plea to that charge in county court sometime around the end of June?
A Yes, we pleaded guilty.
Q What charge was that?
A It was a larceny charge.
Q Grand larceny fourth?
A I believe so, yes.
Q What was the basis of that charge?
A Had a problem with the place that I had been employed prior. There was a snow blower that was missing and some other items out of his garage after we departed and I was involved in that.
Q And you plead guilty to that?
A Yes, sir.
Q And you've testified earlier in your direct that you signed a plead and cooperation agreement which you identified in connection with this case?
A Yes, sir.

Q Can you tell us what your understanding is of the plea and cooperation agreement and what–what's going to happen to you in connection with this matter?

A Well, I don't see where my testimony really amounts to anything coming my way in a favor. I'm still facing the same charge. I'm still facing the same amount of time, if convicted. If being, saying my part in being honest about what went on, it–there's no guarantee I would get any favors, time cuts whatever.

Q Do you know–do you know if you were given any assurances with regarding concurrent versus–in terms of a recommendation of concurrent versus consecutive sentences?

A My understanding was the state would run concurrent with any federal, federal time, federal charges.

Q All right. Now, just backtracking a little. The evening–well January 22, 1999, when you were leaving at the end of the workday, do you recall if you checked the building at all as far as the doors of the building?

A Again, compulsive disorder, I always do. I wold walk through the factory, check the rear doors, both rear doors, three rear doors, actually, in the factory area. Make sure all the lights were turned out, and then Debbie, if she was there, would walk out and make her walk out the door.

Q What was the status of the doors in the building at the time you left?

A At the time I left they were all locked. All closed.

Q And now you came–when you came back, you went in through the front door and reception area?

A Yes, sir.

Q Did you have a key?

A Yes.

Q Did you use the key?

A To go out the front door?

Q To get in.

A Yes.

Q Did you lock the door when you left?
A Yes.
Q Now, can you tell us back in June at around the time you pled guilty in the Broome County Court to grand larceny, what your understanding was of the sentence you were going to receive at that time?
A At that time, it was 18 months in a –I believe it was a rehab center. Then it changed two to four years. I had a public defender.
Q Do you recall any discussions about going to drug rehab facility?
A Yes.
Q And what was your understanding of what would happen had you completed that?
A My understanding, if I completed it was, I would just be probation, I believe.

We never really discussed in any great detail after that. The problem was, I didn't have a drug problem and there was–medication problems were involved, and in my opinion the rehab center, I guess we had a miscommunication of what I though it was, and what they said it was.
Q Now, do you take any medication for–you said you have anxiety disorder?
A Yes, sir, I do.
Q Do you take any medication for that?
A Yes.
Q What type of medication do you take?
A Muscle relaxant to calm the nerves down and I take Zoloft for anxiety disorders.
Q Now, do you recall actually going into custody around July 5 or so of this year?
A Yes, sir.
Q And where did you go when you went into custody, what facility?
A Owego. Tioga County. Actually it was one night at

Broome County and then to Tioga County.

Q And were you provided with your medication when you went to the Tioga County Jail?

A No, sir. Not when I first go there.

Q Now, after you had been in the Tioga County Jail for a number of days, did you have occasion to write a letter to Judge Matthews, Broome County Court?

A Yes, sir, I did.

Q And can you tell us what your purpose was in writing this letter?

A Had been in court on hearings at two different occasions and I was without my medication for approximately tow-and-a-half weeks. What was being said in the courtroom and what was being said to me at that time, my public defendant–

Q Who was that?

A James mack–was not coinciding with my understanding of anything. There was other things being said, district attorney and assistant showed up one different time. Was confused on what was going on. There was things said that I just didn't remember ever speaking about, and I was just couldn't understand where some of the stuff was coming from, so I had wrote to the Judge and informed him that I did suffer from a memory problem dealing with my lack of medication. The purpose was to get back in front of this Judge, into the courtroom.

Q What for?

A After they started my medication, I was in a better position to start to be deciphering everything that went on. I wanted to get back into the courtroom.

Q Let me show what you I've marked as Government Exhibit 341 for identification. Do you recognize what that is?

A Yes, sir. It's the letter I wrote.

Q And that's your handwriting?

A Yes, it is.

Q Now, do you have any problem recalling events that you've testified here to today?

A No, sir.

MR. DOOLEY: Can I have one moment, your Honor?

THE COURT: Sure.

Q Mr. Edison, shortly after the fire occurred, do you recall investigators coming to speak to you?

A Yes, sir.

Q And do you recall providing them with a couple of brief written statements?

A Yes, sir.

Q And in those statements did you acknowledge to them or admit to any involvement in the fire?

A No, sir.

MR. DOOLEY: I think those are all the questions I have at this time, Judge.

THE COURT: Mr. Pelella.

MR. PELELLA: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. PELELLA:

Q Morning, Mr. Edison.

A Morning.

Q I just want to make sure I understand this. After the fire, you were suppose to get $10,000?

A Yes, sir.

Q Actually, you were suppose to get $5,000 before the fire?

A Yeah.

Q And then $5,000 after?

A Yeah. But Bruce wasn't in any position to do that.

Q So even though you knew he wasn't in a position to pay $5,000, you went ahead and started a fire at 407 Airport Road?

A Yes, sir.

Q And knowing that you and Debbie Bower were the only people working at that building at the time?

A Yes, sir.
Q And knowing that you have quite a lengthy criminal record?
A Yes, sir.
Q So you decided that I'm going to do I?
A Yes, sir.
Q That was in '99, January of '99?
A Yes.
Q And after that time, let's see, you went bankrupt?
A No, I was still working. Bruce and I were still working for another approximately four weeks, about three, four weeks.
Q I thought I heard you say at some point after '99 up until the present time you considered bankruptcy?
A I considered it, yes.
Q And you were losing everything you had?
A Yes. I was waiting for Social Security.
Q And, in fact, you testified about the government paying you to stay at the Executive Inn?
A I didn't stay at the Executive Inn.
Q Where did you stay?
A Actually it was a motel, Washington Ave, Endicott motel.
Q They were paying for you to stay at the hotel?
A For six days, yes.
Q They were giving you so much money a day?
A Five dollars a day.
Q Sure it wasn't ten?
A No, it was five.
Q You sure about that?
A That's all I received.
Q So if they said in a report that they paid you ten bucks a day, they're wrong and you're right?
A I only remember five.
Q Did you have to come to this building and get the money?

A No, to Endicott Police.
Q Did you sign for the money?
A Yes.
Q So every day you would give them a–you'd sign a piece of paper saying I've received my money for today?
A No. It was probably every three days, two days.
Q But given all that, am I correct your testimony is that after this fire that you would only occasionally talk to Bruce about getting paid?
A Yes, because I was working. I had a job after the fire. I worked at Shapiro's. I had worked as an apartment manager on Tracy street for almost two-and-a-half years. Year and a half. Almost two.
Q But here you are in June of 2002 living on Social Security disability.
A Yes.
Q Living month to month?
A Yes.
Q Knowing that Bruce, who has told you he had a job–
A Um-hum.
Q –owes you $10,000?
A Yes.
Q And yet you didn't care about calling him and putting pressure on him to pay you?
A No, I wouldn't put pressure on him. We talked considerably after that.
Q Now, you just also testified about this plea and cooperation agreement with the federal government?
A Yes.
Q And really nothing's been promised to you–
A No.
Q –except you are going to do federal time instead of state time?
A I believe so. I'm not sure at this point.
Q Who is Allen Reynolds?

A He was a gentleman that lived downstairs in an apartment underneath me.
Q Underneath you in Endicott?
A Yes.
Q And while you are in Tioga County Jail, did you correspond with him?
A Couple different times. About three times.
Q Do you remember one time bragging to him that you were going to do federal time as opposed to state time?
A Yes.
Q That federal time is actually better than state time?
A Sure.
Q So, you were getting a benefit, weren't you?
A If I got federal time, yes.
Q In fact, didn't you tell him in that letter this was going to benefit me?
A I don't believe I said.
Q Meaning this case?
A I don't believe I said it would benefit me.
Q You never said that to–
A Allen Reynolds is probably one of the reasons I got arrested in Endicott in the first place.
Q You still decided that while you're in Tioga County Jail you would write to him?
A Yes. Twice because he owed me money.
Q Were you on medication when you wrote to him?
A Yes.
Q Are you on medication today?
A No.
Q You're not medicated every day?
A Not every day.
Q When was the last time you were medicated?
A Yesterday afternoon.
Q So you get medicated every afternoon.
A Well, I take an antiinflammatory.

Q That's all you're on?
A At this time. I would take probably Zoloft when I get back later this evening. I take it at dinner time.
Q When you came into federal court and pled guilty in front of Judge McAvoy, were you on medication?
A Not the day I pled. The only thing I took was aspirin for anti-inflammatory and Darvocet and Zoloft I'd taken the day before.
Q And without this medication, it's hard to function?
A If I go without it for any length of time, two weeks or better, yes, because it's a medication that builds up in your system.
Q Now, yesterday you described some of your arrest record, criminal record.
A M-m h-m-m.
Q you indicated that at one point you were arrested for criminal possession of stolen property?
A Yes, sir.
Q I think you said that there was no disposition on that case?
A There was one back in 19–I believe the lat '70s, possession of stolen property in Middletown, New York. I don't believe there was ever a disposition on that. I was arrested after my wife and I divorced for attempted possession of a forged instrument. And right after that, late '70s, there was possession of stolen property.
Q How about 1980, were you convicted for grand larceny third degree?
A That was the one stolen property, yes.
Q You got five years probation and time served?
A I got five years probation and then I served 18 months in the state correctional facility.
Q Why did you do that? You messed up on probation?
A Yeah. Basically.
Q So back in 1980 the Court said, "Look, I'm going to

place you on probation, you follow the conditions," and that's it?

A Yeah. It was still a charge outstanding prior to the probation.

Q But you messed up on probation. You didn't follow the rules of probation?

A No, I was never violated on probation.

Q So you did jail time on another charge?

A Prison time, yes. The only charge was not taken care of during the time of the probation.

Q Now, is that the possession of forged instrument?

A I believe it was, yes.

Q Is that when you went to prison?

A Yes, sir.

Q You went to Attica?

A I went to Attica reception and then I went to Camp Pharsalia, minimum security.

Q And then you talked about being convicted in 1989 for criminal possession of a controlled substance?

A Yes, sir.

Q Got seven years to life?

A Yes, sir.

Q Did you forget to tell the Court yesterday about another charge you were convicted of at that same time?

A Possession of a weapon.

Q Criminal possession of a weapon?

A Yeah.

Q A violent felony?

A Yeah.

Q Two to four on that?

A I believe it ran concurrently, yes.

Q You didn't remember that yesterday?

A It was–it was incorporated in the plea for the charge.

Q You did all seven years?

A Yes, sir.

Q And then you got–you were on parole for life?
A Yes, sir.
Q Were you discharged from that?
A Yes, sir.
Q When were you discharged?
A Year 2000. I don't remember the exact date. I don't have my paperwork. I was discharged from parole.
Q And then you had this charge you pled to in state court in front of Judge Matthews?
A Yes.
Q And that's grand larceny?
A Yes, sir.
Q And I think you just testified that it was–you stole a snow blower?
A It had to do with the apartment complex I was managing. A snow blower. Some property that was there belonged to the owner of the property.
Q Who was the owner of the property?
A David Kapoor.
Q Well, sir, you took more than a snow blower, did you not?
A Probably but that case still hadn't come to a decision yet.
Q I though you pled.
A I had pled guilty to grand larceny, but there's still a probation report being done and seeing to what degree Mr. Kapoor–Mr. Kapoor was paid back.
Q Restitution?
A A large amount of money.
Q Why is that, sir?
A Because I decided to pay it back to him.
Q No, but why do you owe Mr. Kapoor a large sum of money?
A It dealt with some credit cards through the company.
Q Okay. You didn't mention that on direct?

A You didn't ask.
Q Okay. In fact, you worked for Mr. Kapoor managing apartment buildings?
A Yes.
Q And you would take the business credit cards and you would charge–
A Yes.
Q –for your own personal use?
A Some of it, yes.
Q How much, sir?
A I have no idea how much.
Q 15,000, maybe?
A It's hard to say. There was about three different prices.
Q Would 15,000 be a fair estimate?
A No, I don't even think it's close.
Q What do you think it is then?
A I think it was probably up to maybe a thousand, give or take. Nobody's ever decided yet, at least's nobody's brought any paper to me to decide yet.
Q But here you were working for Mr. Kapoor and he trusted you with some credit cards?
A Yeah.
Q And you misused that trust, did you not?
A Yes.
Q In fact, didn't you also make up a false receipt register?
A Well, that's what David would like to have everybody think. We've never actually came up with that either because David has pending charges with the State Police. They're investigating that.
Q They're investigating you?
A No, they're investigating him.
Q They're investigating him. They're investigating Mr. Kapoor?
THE COURT: Let's have a side-bar for a minute.
(At the bench:)

THE COURT: It appears that, at least from my perspective, that what you're asking him about now may entail charges that are being investigated and have not yet even been brought against him, or have been brought and haven't been disposed of, and if that's the case, I'm going to have to worry about incrimination and so–

MR. PELELLA: I thought it was connected with what he pled to.

THE COURT: Yeah, that's what I thought, too. It just turned out it wasn't. You didn't know, I'm sure, and I certainly didn't, but it can go one of two ways. We can get him counsel and have counsel advise him about his Fifth Amendment rights, or what do you want to do? I think that's my obligation.

MR. PELELLA: I think it goes to his credibility and I think it's important for my cross-examination.

MR. DOOLEY: I can state on the record that Lisa Peebles is representing him. I had discussions with her about him testifying today, and I don't think she felt the need to be here to sit here through the testimony.

THE COURT: She didn't? Well, I think I feel the need to at least mention to him that he has a right not to incriminate himself, and he has a right to say that he won't answer questions, and take his rights under the Fifth Amendment. I think that would be sufficient. I don't know what else an attorney cold tell him.

MR. DOOLEY: To be honest, Judge, I'm not sure, maybe Mr. Pelella has more information on this. But I don't really have all the details of the grand larceny. I know they're grand larceny charges related to his dealings with Mr. Kapoor. There were a lot of cross allegations back and forth that had some discussion with the Endicott police about what was going on.

MR. PELELLA: I think the State Police are involved, too. That's my understanding. It was a State Police case.

MR. DOOLEY: Yeah. My conversation through

Investigator Kaminski–detective, because he was involved with Mr. Edison. So, but it was–there was a lot of things being looked at. I don't know specifically what the charge that he pled guilty to is. That was just a small piece of it, and there's other things floating around.

THE COURT: That's what it seems like. I certainly want to advise the defendant of his right to remain silent in face of these questions, if he invokes his right under the Fifth Amendment or he can answer the questions as he sees fit.

MR. DOOLEY: I would want to get his attorney involved. I don't want to run into a problem if he invokes his right on this charge so that that's going to create any problems with the admissibility of the rest of his testimony.

THE COURT: I don't see how it has anything to do with his testimony, except I see it affecting his credibility. As trier of facts, that's one of the things I have to focus on and take into account, and I'm deciding how much of his story to believe and how much not to believe.

This evidence that's coming in now is coming in on credibility. That's why defense counsel is doing it. But if he is testifying in another area about I did this on one day, I did that on another day, it hasn't anything to do with criminal activity, it has to do with this case, it's relevant for that matter, it's going to come in in the same way.

MR. PELELLA: Instead of Lisa Peebles, couldn't we get ahold of Jim Mack? That's who's prepping him on what I'm asking him.

MR. DOOLEY: I've never even spoke with Jim Mack about this. Maybe she's had conversations with Mack.

THE COURT: I'm going to ask him on the record if he's talked to Lisa Peebles.

MR. DOOLEY: He may not even care.

MR. PELELLA: He might not.

THE COURT: Let's see what he says.

(In open court.)

THE COURT: Mr. Edison, it appears from the questions that were being asked by Mr. Pelella and the answers that you were giving in the last few moments when Mr. Pelella was cross-examining you had to do with your interaction with David Kapoor when you were involved in managing apartments for him. And arising out of that in part there was a charge against you for taking a snow blower and some times and you pled guilty to that, as I understand it.

THE WITNESS: Yes, sir.

THE COURT: Now, the attorney's asking you about some other matters, including misuse of a credit card, and other things, and it might involve further charges against you by the state. And did you have a chance to talk to your attorney, Ms. Peebles, about testifying about that before you came here today?

THE WITNESS: No, sir, I haven't.

THE COURT: Do you realize that you have a right under the Fifth Amendment to the United States Constitution not to incriminate yourself, and in order to be on the witness stand and testify, and refuse to answer questions about conduct that may further incriminate you, you must formally invoke that right.

You must say that you won't answer questions and you're not going to answer because you understand that the information being requested might tend to incriminate you and, therefore, you're invoking your Fifth Amendment privilege.

But if you do that, of course, there may be other problems and complications. Let me ask at this point in time, would you like to speak with Ms. Peebles about that before you continue to testify, or do you just want to go ahead and answer the questions.

THE WITNESS: I'll answer them to the best of my ability.

THE COURT: All right. You have in mind what I told you about the information might be the basis for the state or federal government laying further charges against you? You

understand that, don't you?

THE WITNESS: The part I don't see, there's still–in the charges that were brought against me, I have brought charges. There is an intense investigation going on.

THE COURT: All right. Some other individual may become liable as a result?

THE WITNESS: Very well. Possibly, yes.

THE COURT: That's not your worry. That's that person's worry.

THE WITNESS: Okay.

THE COURT: All right. Mr.Pelella you, may continue.

BY MR. PELELLA

Q So it's your testimony under oath that you did not have a different set of receipt books or different receipt books–

A No, I did not.

Q –that you kept on your own?

A No, I did not have a different set of receipt books, no.

Q Would you take receipts from Mr. Kapoor's book and give them to tenants?

A That was my job, yes.

Q But would you then falsify the receipts?

A No, I didn't.

Q Would you give all the money that you obtained from the tenant back to Mr. Kapoor?

A Yes.

Q Each and every time?

A Not each and every time, no. There was money used for expenses. There was money used for supplies. David Kapoor would say I kept some of his moneys. I would like to say he kept a different set of books. That's the dispute between him and I on the legal grounds.

Q Well, is there a case pending?

A I'm not sure, to be honest with you, if the case if pending or my attorney and his attorney have gotten together. Whether the State Police has gotten together, I'm not sure.

Q How many charges do you have pending in Broome County Court?

A Just that one.

Q Grand larceny charge?

A Yes.

Q You've already pled?

A Yes.

Q And it's your understanding–when are you going to be sentenced on that?

A I have no idea.

Q But it's your understanding that you're going to get two to four?

A It was 18 months in rehab and it was my understanding the last I spoke to Mr. Mack was a two to four was brought, yes, but I haven't heard anymore about it since. I haven't gone. I think they just started probation report, so I haven't been back in front of the judge since.

Q I think you testified a little bit ago that the probation report's going to determine the amount of restitution that's owed?

A If there is restitution, yes. I'm not even sure of that right now.

Q Do you have – are there any other cases pending against you?

A Not that I know of.

Q Now, you were asked about your testimony in front of a grand jury investigating this particular matter?

A Yes, sir.

. . .

Q And your reason why you wrote that letter to Judge Matthews?

A Yes, exactly.

MR. DOOLEY: Judge, I have marked as Government Exhibit 342 the plea minutes in this case, which I'm not sure, because it's a bench trial, what would happen, but I think that

because of the allegations that have been raised, that it's appropriate to make part of the record the actual minutes of the plea. And I would offer the plea minutes in at this time. This issue is fully discussed.

THE COURT: What's the exhibit number you got on it?

MR. DOOLEY: 342.

THE COURT: You're offering those under 801(d)(1)(b), are you?

MR. DOOLEY: I can't tell you that I'm familiar with that exact section, Judge.

THE COURT: You want to take a look at that section?

MR. DOOLEY: Sure. Do you have a copy? I don't have the–thank you, Judge.

What section did you say, Judge?

THE COURT: 801(d)(1)(b).

MR. DOOLEY: Yes, Judge. Thank you.

THE COURT: You're welcome.

MR. PELELLA: Judge, as far as the offer of Government Exhibit 342, I would object as far as what's in here as far as comments from the attorneys. There's–looking ahead in this exhibit, on page 28, I think you asked him what the letter means, and he gives an explanation. I think I would still object to it, but if my objection's overruled, I would at least ask the Court to consider just limiting this to that particular answer by the defendant as opposed to representations made by Mr. Dooley and by the defendant or by this witness's attorney.

THE COURT: Yeah, I think that makes some sense, Mr. Pelella.

MR. DOOLEY: Well, Judge, my position with respect to that would be that Mr. Edison was standing there, and I believe things were laid out on the record in his presence, and then my recollection of it is that he–then you asked him questions about that, and he essentially adopted what was set forth on the record.

THE COURT: I don't know. That's what you're

objecting to. You're objecting to other colloquy. I think you said as far as his explanation for what that letter meant, you had no objection to that?

MR. PELELLA: That's right.

THE COURT: Right?

MR. PELELLA: That's right.

THE COURT: But you object to other colloquy.

MR. PELELLA: Comments made by the attorney.

THE COURT: When you say "comments", what do you mean by comments? In other words, Mr. Pelella, if the explanation standing alone is meaningless, without the prefacatory remarks, then the Court would probably have to consider the prefacatory remarks admissible only for the purpose of explaining the meaning of the explanation. But insofar as they don't deal with that matter, then the Court certainly won't consider them, because that's the only part that would be admissible under 801(d)(1)(b).

MR. PELELLA: There's a lot of discussion about whether or not to transfer him to a medical facility.

THE COURT: Well, I wanted to be sure at that point, as I'm sitting here recalling it now, that he was competent to enter the plea that he was entering and I wanted to be sure there was no doubt about that because I'm under an obligation not to take a plea from somebody if I have even the slightest question about their competence to enter the plea.

MR. PELELLA: Right.

THE COURT: And after the colloquy and what the witness told me, I was convinced that I could take the plea and did. But who knows how that's going to come out.

MR. PELELLA: But he–maybe if the Court can review it. He on page 28 goes right into what the purpose of the letter was and I don't think there needs t be any of these statements made by Mr. Dooley or by his attorney.

THE COURT: I'll tell you–let's do this in the interest of moving the case along. I'll admit the Exhibit 342 but subject to

redaction. Then you and Mr. Dooley and I, or you and Mr. Dooley in the first instance can see if you can agree on what should be taken out of that exhibit for the Court's review and what should not be before the Court. If you can't agree, then I'll rule on it.

MR. PELELLA: Okay.

THE COURT: Redaction. Is that all right?

MR. PELELLA: Fair enough, Judge.

THE COURT: So receive Government's 342 subject to redaction.

MR. DOOLEY: Thank you.

BY MR. DOOLEY:

Q Mr. Edison, what kind of car did you have back at that time?

A I believe it was a Chevy Cavalier, an older one. Probably late–early '80s.

Q Now, Mr. Pelella had asked you some questions about

. . .

Prosecutor's Summation

In terms of his motivation, I would ask the Court to consider–just go through any type of mental gymnastics you can. Not only is there no proof as to any motivation on his part to come forward, other than what he said, but it just doesn't make sense. Here's a person who's not charged, who obviously the government didn't have sufficient evidence to charge. I think you heard testimony that there was suspicions about Gary Edison initially because he didn't mention, you know, the computer was removed from the place the day before the fire or the day of the fire. That was obviously a red flag and aroused suspicion on the part of the investigators. But Gary Edison is–how does it make sense other than what he's telling you? He came forward–other than rank speculation–about theoretical motives. Yeah, is it possible that spaceship came down from

Mars and someone starts this fire accidentally. You can always speculate about this but there's no evidence in this case, other than what Gary Edison told you, about his motivation for coming forward. And no other speculative theories, Judge, really make sense because if Mr.–if Mr. Mason had no involvement in this case, Gary Edison would have no motivation to come forward based on a fear he would flip him in and then he was home free. It makes no sense and he knows, in entering his plea, that he's hoping for consideration but he has every expectation that he's going to federal prison as a result of this.

So, there's really no credible evidence before the Court that he has any independent motive to have committed this crime other than the fact that Bruce Mason had promised him $10,000 to do it. And, in fact, if there's a little bit of attention here with the evidence because the defendant has produced witnesses on his behalf, Mr. Ware who is saying apparently somewhere in between, I can't tell you what the cause if or I can't rule out accidental causes or maybe leaning towards electrical, but they're not certainly–the experts he produced aren't saying it's an intentionally set fire. So, the defense really doesn't seem to be that Gary Edison did this on his own without any prompting from Mr. Mason. It just doesn't make sense, Judge. It fits in exactly with what's happening here. The evidence of what he did with the barrel. The evidence the investigators found. It's all consistent.

The last few counts, Judge, when I say few counts, 11 through 16, the last mail fraud scheme contained in the indictment. In those, 11 through 16 are the counts

. . .

Defense Counsel's Rebuttal

two words, Gary Edison. Now, Mr. Dooley wants you to analyze Gary Edison like you would any other person. But Gary Edison is different from you and me and from anybody else.

Gary Edison is a long-life criminal who steals, lies and cheats. He has no qualm about going in the grand jury under oath and lying. He has no qualms about taking from someone who puts trust in him, and he spent a lit of years in jail. So when Mr. Dooley says, well, there's nothing in there for Gary Edison. If Gary Edison thought like a logical person, maybe that's right but when Gary Edison thinks–he thinks about doing federal time, as opposed to state time, and to him, maybe not to us, time is time to us, and it's not something any of us would want to do but to Gary Edison there's a difference between federal time and state time. And there's another motive for Gary Edison, and that is that he's a nervous person. Suffers from anxiety. And when he's preparing for grand jury, and he says to the investigators and to Mr. Dooley, that, hey, I don't think–I don't think Mason did this, they say, well, Mason didn't do it. Maybe Edison did. Now, he's thinking. He's thinking that maybe he's a target and that he better work out the best deal he can. See, this is where the government's case goes haywire with regard to this arson. They had already done their investigation. They had already testified in grand jury. And their focus, your Honor, was on the southwest corner of that manufacturing area. Their focus wasn't on a plastic barrel ten feet or so inside the doorway. You can look at this one chart that was used at grand jury and you can see how it starts by the door but then quickly goes off to the west side. Now, I would submit that ten feet would be much more into the south end of the building than what this diagram shows. But this diagram, your Honor, is consistent with how Investigator Redsicker testified. Now, when he came into court in this trial, after testifying about the southwest corner for a while, and after you pointed out to him that, you know, southwest corner's where the two walls meet, is that where you're referring to and he says no. It's the southwest quadrant. That's not how he testified in grand jury.

Mr. Dooley made a point of talking about Mr. Ware's testimony in grand jury, but in the grand jury where Mr.

Redsicker came in and testified under oath, he was shown two photos. The first was this photo. He says this is looking across from east to est and in this area right here was our most heavily damaged area of the west wall. Now he's not talking about ten feet inside the back door. He's talking about the west wall. You can see there are two studs still standing there. He's not talking about the center of the manufacturing area. He's talking about the west wall. Two studs still standing there but the majority of them are completely gone. And this (indicating) is the area that we've determined being basically the point of origin of the fire. Not area of origin but the point of origin of the fire. And then, your Honor, there's a follow-up. There's a closer view of that and he says this a close-up view of the point of origin. The–you can see the heavy charring of the sill plate. Now, the sill plate isn't located inside the door. It's located on the wall. There's protected area right there. That's probably from insulation or part of the wall as it dropped down. But that's where he is indicating to the grand jurors that the fire started. Point of origin.

Now, I would submit to you, your Honor, that that point of origin, as they came in and testified to grand jury, is not consistent with Mr. Edison. Not consistent at all. So now Mr. Edison comes forward in June and he gives a statement to the police and he says that, first of all, he doesn't want to do the fire in December because he's–he would be a prime suspect. So he picks January 22 when he's one of two employees working there. He's the last one to leave. He pulls up with his car in front of the building. He turn the light on. He walks around. He takes his lighter fluid can, fingerprints all over and he leaves the can at the scene. So he didn't want to do it in December because he was worried that he would be the prime suspect but now he wants to do it on January 22 because Bruce Mason told him to do it. And then he says in the statement Bruce Mason wanted me to do it over by the electrical service. That's what he says in the statement on June 12. Now he comes into court

here and tells you, Judge, that he, Bruce Mason, tells him to do it in a barrel by the back door. Doesn't say that at all in his statement. Not at all. And he classifies it as a large, industrial plastic garbage can. So now we've got Investigator Redsicker saying, you know, what I found, a plastic container. Maybe I'll start calling that a barrel and what I'll do is I'll come into court and I'll say I took my sample right from that plastic container, because that will be consistent with Gary Edison, except there's one problem. This photograph was taken on the second visit to the scene. He acknowledged that on cross-examination. You can see the daylight.

MR. DOOLEY: I'm sorry. What photograph is that, Government Exhibit?

MR. PELELLA: This is Government Exhibit 291 but he also had Government Exhibit 266. See when he takes a sample, he documents it by taking a photograph, and by taking a photograph with his sample can in that photograph. Now, when he left court here last Friday, his testimony was that he took the sample from 291. But when we left Court on Monday, he had to admit that he didn't take it from–where the plastic container was. He took it from what's shown on the screen right now. That looks awfully similar to Government's Exhibit 224, which is the same pile of papers or pile of papers that Investigator Winchell took his sample from. The problem they had was because of Edison, Edison's statement was not consistent with what they had found. So now they are–they have a square peg trying to fit it in a round hole or is it a round peg in a square hole? But either way they're trying now to tailor their testimony.

You know, Mr. Dooley talked about, well, Mr. Ware at grand jury said that the fire, his opinion was fire was such and such, but now at the trial he's staying it's the other way around. We go in reverse now with the government's witnesses. They're trying to make Mr. Edison fit. What doesn't make sense, your Honor, in addition to the fact that he said he put it

off from December and decided to do it on this night, was doesn't make sense–first of all, he says he doesn't trust Mason. So, you're going to stick your neck on the line for someone you don't trust. Someone who is suppose to pay you 5,000 up front. Now it would seem to me when he got a call, as he claims he got a call, at 7:30 on January 22, instead of jumping up and going right down to 407 Airport Road and doing an arson, that he would say where's my 5,000? Because that's how Gary Edison thinks. In fact, on cross-examination he told us about a letter he wrote to a guy by the name of Alan Reynolds who owed him money and he needed the money. The other thing we know is during this time, after January 22, he was in financially bad shape. Yet he never harasses Mr. Mason for his money. The guy who lives from day to day, someone out there owes him $10,000 and he's not calling up Mason every day threatening Mason that if he doesn't get paid, he's going to do something. But he does the alarm because he doesn't trust Bruce Mason but yet he's going to do the fire. What doesn't make sense, Judge, is how he describes how he does the fire. Howe he walks back there, and my recollection of the evidence, and this is my recollection, but he says he uses five ounces, had a five-ounce can of lighter fluid that he pours most of it into the plastic barrel. He doesn't know how much paper is in the barrel and he throws a match over by the garage door and then he goes back into the office area and dumps a shot glass of lighter fluid back in the office area. Now, a shot glass I'm not–I don't do shots but it's one or two ounces so that leaves about three ounces–and the day I was cleaning out my garage and I came across a five-ounce can of lighter fluid.

MR. DOOLEY: I'm going to object. I don't think this is evidence in this case.

MR. PELELLA: I know it's not evidence. I just wanted to use it as an example of what five ounces is. That's how he burned this building down and that's what he says. And we know he lied to the grand jury. We know he lied in his

statements to the police. And we know that he sent a letter to Judge Matthews. Now, we know he did lie to judges before. We know he gave a statement to the police, testified that he knew it would go to a judge, indicated he knew it wasn't truthful, but here we have a letter to Judge Matthews where he is saying he's memory impaired. He doesn't know what he did or does to the point of not remembering if I did or did not do what I'm being charged with or whether I may have said things that I don't remember just because someone told me I should. I am very easily lead. And then on the second page, and I asked him on cross-examination, are these conditions that you mentioned in the letter, are they real? And he said yes. He has these conditions. His second condition is an anxiety disorder which will make me say I did things when I really didn't. And yet the government is coming into this courtroom and is asking you, as a trier of fact, to rely on Gary Edison. He has to ask you to do that because he has no other connection between Bruce Mason and the fire at 407 Airport Road.

Now, Mr. Dooley will say that, well, he just wrote this letter because he didn't like how his attorney was handling things in county court. The fact is, Judge, he wrote this on July 9, 2002, and what he is saying in this letter, your Honor, is that he can't be trusted which is something we already knew, but he's also saying he can't be reliable and that he will say and do things just for the sake of saying and doing things. Admitting to things that he didn't really do. And I submit to you that that's reasonable doubt.

Thank you very much, your Honor.

Prosecutor's response

With respect to Mr. Edison, the Court's going to have evaluate his testimony and give it what weight it deems appropriate. The one thing that can be said at this point that, in essence, what I said earlier remains. That there's no–there's still no indication of any motivation for him to come forward

and do something like this and in terms of what's in that letter that he wrote to Judge Matthews, he explained that. That was him reaching out because he felt there was a problem with his attorney on the state side. Was it an honest thing for him to do? No, he acknowledges that what he was trying to do was trying to get himself back before the county court judge to get clarification of what was going on with his situation. The Court is certainly capable of evaluating his testimony in terms of his actual appearance and demeanor, his level of intelligence, h is mental condition, his mental state which he testified here and he testified that he certainly, absolutely recalls starting this fire on behalf of Mr. Mason.

With respect to the allegation of him doing federal time versus state time, when Mr. Edison came forward to the government with this, there's no indication he knew what was going to happen. And as the Court is aware in terms of some of the sentencing guidelines, he could be facing a lot of time by admitting to starting the fire, being charged federally and using fire to commit another felony such as insurance fraud. Gray Edison had no idea when he decided to come forward what the relative amount of time he was facing, etcetera. What that was, his concern at that time was what whatever he could face federally, if he were charged with this, that he was in a position at that time of being concerned about Bruce Mason coming forward and pointing the finger at him–at Gary Edison to save himself. And it was for that reason that he cam forward and that is still perfectly clear in terms of his motivation for why he came forward.

Criminal History
Date: 7/3/02
Name: Edison, Gary M.

Arrest Information	Arrest/Arraignment Charges	Disposition And Related Data
	PL 220.50 Class a Misd Crime Possession Stoln Prop-5th Pl 165.40 Class a Misd Unlaw Poss Marihuana PL 221.05	Penal/Parole Data Elmira Corr Fac - Admission 11-07-90 Committed, On Parole Term: 7 Years to Life NYS Dept Corr - Released 07-24-97 Paroled NYS Parole NYS Div Parole 07-24-97 On Parole Life NYS Div Parole 09-29-00 Dischg-Brd Direction
ARR DT/PL 01-16-02 ENDICOTT CRM Date: 01-08-02 Crime Place: Endicott	–ARREST-- GR LAR 4: Value Property >$1000 PL 155.30 Class E Fel	No Disposition Reported
ARR DT/PL 02-16-02 UNION	–ARREST-- GR LAR 4: Value Property >$1000 PL 155.30 Class E Fel	No Disposition Reported
ARR DT/PL 06-24-02 CRM Date: 06-05-02	–ARREST– Forgery: Deed Will Codicil Etc PL 170.10 Class D Fel	No Disposition Reported

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

****

UNITED STATES OF AMERICA

INDICTMENT
Criminal Action No.
3:01-CR-376(TJM)

vs.

Vio: 18 U.S.C.§1344(1)
18 U.S.C.§§1341&2[12 Counts]
18 U.S.C.§§1342&2
BRUCE H. MASON, 18 U.S.C.§§1343&2
18 U.S.C.§§844(I)&2
Defendant. 18 U.S.C.§§844(h)&2

[17 FELONY COUNTS]

****

THE GRAND JURY CHARGES THAT:

INTRODUCTION

1. At all times relevant to this indictment, 407 Airport Road, Endicott, New York was a commercial building used by a business which was involved in manufacturing birdcages. The trade mane of the business was "Next to Nature." The defendant, **BRUCE H. MASON,** was continuously involved in using that location to run the business from the time "Next to Nature" began doing business there in November of 1995, until a fire occurred at that location on January 22, 1999.

2. In 1992, a company named "Champnion" was incorporated in the State of Delaware, and **BRUCE H. MASON'S** wife, Judith Martino Mason, was the sole shareholder and officer of that company. The alleged purpose of this company was to engage in "marketing and advertising" with respect to products manufactured by "Next to Nature."

3. From approximately 1992 until June of 1995, the birdcages were being manufactured by a company named "Braciti," which was "doing business as" ("d/b/a") "Next to Nature," in the Sayre, Pennsylvania, and Waverly, New York area. Prior to June of 1995, "Braciti" was managed and run on a daily basis by **BRUCE H. MASON**. In June of 1995, a company called "Southern Tier Pet Products, Inc."(STPP) was incorporated in New York State, with **BRUCE H. MASON** being the sole shareholder and officer of that company. STPP was also "d/b/a" as "Next to Nature", and STPP manufactured birdcages at 407 Airport Road, Endicott, New York, from November of 1995 until October of 1997, when "Express Wire Productions, Inc." (EWP) was incorporated in New York State, with Judith Martino Mason being the sole shareholder and officer of that company. EWP was also "d/b/a" as "Next to Nature," and EWP was engaging in the same exact business at the same location with the same employees as STPP. Both STPP and EWP were manages and run on a daily basis by **BRUCE H. MASON**.

4. BSB Bank & Trust Co. in Binghamton, New York and Bank One in Columbus, Ohio were both financial institutions insured by the Federal Deposit Insurance Corporation during the time periods relevant to count one of this indictment.

COUNT ONE
(BANK FRAUD)

During the approximate time period of July through December, 1996, in the Northern District of New York, and elsewhere, the defendant **BRUCE H. MASON** did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud a financial institution, by engaging in conduct commonly referred to as a "check kiting," which involved a series of rotating deposits of checks written between accounts at BSB Bank & Trust (Account No. 340062181) in

Binghamton, New York, and Bank One (Account No. 4168590589215) in Columbus, Ohio, which created artificially inflated balances in those account, thereby causing a loss to the BSB Bank & Trust of more than $40,000.

In violation of Title 18, United States Code, Section 1344(1).

COUNTS TWO THROUGH FIVE
(MAIL FRAUD)
A. SCHEME

Beginning in or about October, 1997 and continuing to the time of this indictment, in the Northern District of New York, and elsewhere, the defendant **BRUCE H. MASON** knowingly and willfully devised and intended to devise a scheme and artifice to defraud numerous venders, creditors, and governmental agencies of money due and owing to them by his business, Southern Tier Pet Products, Inc., by means of false and fraudulent pretenses, representations and promises, said defendant knowing at the time that such pretenses, representations and promises were false and fraudulent, which scheme and artifice is more fully described in Section B below.

B. WAYS AND MEANS

1. The defendant, **BRUCE H. MASON**, was experiencing extreme financial pressure with respect to his business, Southern Tier Pet Products, Inc. d/b/a Next to Nature, in 1997. Therefore, it was a part of said scheme and artifice to defraud vendors, creditors, and governmental agencies of money which was due and owing to them from STPP, that in October of 1997 **BRUCE H. MASON** caused a new company, Express Wire Products, Inc., to be incorporated in the name of his wife, Judith Mason. **BRUCE H. MASON's** wife used her maiden name, Judith Martino, in connection with the

incorporation paperwork, and was the sole shareholder and officer of that company.

2. It was part of said scheme and artifice that when vendors and creditors of STPP attempted to collect money owed to them by STPP, **BRUCE H. MASON** caused the claim to be made that a "secured lender" had foreclosed upon STPP, and that EWP was a different company which was not responsible for the debts of STPP. The "secured lender" in this scheme was "Champnion," a company owned solely by Mason's wife, Judith Martino Mason. This scheme was carried out in order to defraud creditors of money which was due and owing to them.

C. MAILINGS–COUNTS TWO THROUGH FIVE

On or about the dames set forth below, in the Northern District of New York and elsewhere, the defendant, **BRUCE H. MASON**, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, placed and caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, and knowingly caused to be delivered by mail according to the direction thereon, the items listed below at the locations listed below:

Count	Date	Description
2	2/15/98	Letter to Worker's Compensation Board in Albany, New York from Express Wire Products, Inc. in Endicott, New York, from "Larry Martin."
3	5/28/98	Letter to Worker's Compensation Board in Albany, New York from Express Wire Products, Inc. in Endicott, New York, from "Larry Martin."
4	7/06/98	Letter to Worker's Compensation Board in Albany, New York from Express Wire Products, Inc. in Endicott, New

		York, from "Larry Martin."
5	July/98	Letter from Worker's Compensation Board in Albany, New York from Express Wire Products, Inc. in Endicott, New York, containing the letter from "Larry Martin," dated July 6, 1998, with a note from a Worker's Compensation claims examiner attached.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT SIX
(USE OF FICTITIOUS NAME IN MAIL FRAUD SCHEME)

In or about 1998, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, did use, assume, and request to be addressed by the fictitious name of "Larry Martin," and did take and receive from the United States post office, mail addressed to "Larry Martin," for the purpose of conducting, promoting, and carrying on by means of the Postal Service, the scheme referenced in counts two through five of this indictment.

All in violation of Title 18, United States Code, Sections 1342 and 2.

COUNT SEVEN
(WIRE FRAUD)
A. SCHEME

In or about 1997 through 1998, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to fraudulently obtain property from numerous vendors and creditors of

Southern Tier Pet Products, Inc. and Express Wire Products, Inc., each doing business as Next to Nature, by means of false and fraudulent pretenses, representations and promises, said defendant knowing at the time that such pretenses, representations and promises were false and fraudulent, which scheme and artifice is more fully described in Section B below.

B. WAYS AND MEANS

1. **BRUCE H. MASON** continually needed to obtain raw goods and services to continue manufacturing birdcages. Since the companies owned and run by **BRUCE H. MASON** alienated many suppliers by not paying bills, **BRUCE H. MASON** was constantly seeking new suppliers of materials for his business. In order to avoid being denied credit as a result of a poor history of making payments to suppliers, **BRUCE H. MASON**, as a part of said scheme and artifice, did provide and cause to be provided false credit references to suppliers of goods and services in order to induce them to provide such goods and services, knowing that such goods and services would not have been provided if actual references were used.

2. It was a part of said scheme and artifice that **BRUCE H. MASON** obtained the assistance of certain employees who provided phony credit references by pretending to be employees of other companies; it was further a part of said scheme and artifice that **BRUCE H. MASON** had persons he never did business with provide phony credit references; such schemes and artifices were for the purpose of enabling Next to Nature, Champnion, or one of the businesses d/b/a Next to Nature, such as Southern Tier Pet Products or Express Wire Products, to obtain good and services which they would not otherwise be able to obtain.

3. As a part of said scheme **BRUCE H. MASON** did obtain approximately $7,000 worth of steel wire on credit from Interwire Products of Armonk, New York, in 1997 as a result of

providing false credit references, which were relied upon by Interwire Products to extend the credit. The money owed to Interwire Products was subsequently never paid.

C. INTERSTATE WIRE COMMUNICATIONS
- COUNT SEVEN

On or about the date listed below, in the State of Northern District of New York and elsewhere, as listed below, the defendant, **BRUCE H. MASON**, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly transmitted and caused to be transmitted in interstate commerce by wire communication from the State of New York to the State of New Jersey, certain signs, signals and sounds, that is, the facsimile transmission of the items listed below:

Count	Date	Description
7	3/17/98	Fax transmission to Dun & Bradstreet in Florham Park, New Jersey from Champnion (Larry Martin) in Endicott, New York, disputing debt owed to Interwire Products.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNTS EIGHT AND NINE
(MAIL FRAUD)
A. SCHEME

In or about the Spring of 1998, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, knowingly and willfully devised and intended to devise a scheme and artifice to defraud the General Accident Insurance company (and it's successors in interest CGU

Insurance Company and OneBeacon Insurance), by fraudulently obtaining property liability coverage on a building located at 407 Airport Road, Endicott, New York, where Express Wire Products, Inc. was doing business, by means of false and fraudulent pretenses, representations and promises were false and fraudulent, which scheme and artifice is more fully described in Section B below.

B. WAYS AND MEANS

It was part of said scheme and artifice to defraud that **BRUCE H. MASON** caused false information to be provided on an application for insurance to be submitted to General Accident Insurance Company, in order to obtain insurance coverage for the property at 407 Airport Road, Endicott, New York. **BRUCE H. MASON** represented on the Accord Commercial Insurance Application form that no policy of insurance had been cancelled during the past three years for non-payment of premiums. In fact, Express Wire Products, Inc. and it's predecessor in interest, Southern Tier Pet Products, Inc., each had policies of insurance canceled within the past three years for non-payment of premiums. Both of these businesses were managed and run directly by **BRUCE H. MASON**, and he had direct knowledge of the cancellation of such policies. Said policy of insurance would not have been issued by the General Accident Insurance Company but for the false representations made by **BRUCE H. MASON** in the application for insurance.

C. MAILINGS - COUNTS EIGHT AND NINE

On or about the dates set forth below, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, placed and caused to be placed in an authorized depository for mail matter, to be sent

and delivered by the United States Postal Service, and knowingly caused to be delivered by mail according to the direction thereon, the times listed below at the locations listed below:

Count	Date	Description
8	4/1/98	Accord Commercial Insurance Application form, signed by Bruce Mason, mailed to General Accident Insurance Company in Syracuse, New York, by the Steve Cardell Insurance Agency in Endwell, New York.
9	5/20/98	Accord Commercial Insurance Application form, signed by Bruce Mason, mailed to General Accident Insurance Company in Syracuse, New York, by the Steve Cardell Insurance Agency in Endwell, New York.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT TEN
(ARSON)

On or about January 22, 1999, at Endicott, in the Northern District of New York, the defendant, **BRUCE H. MASON**, maliciously caused to be damaged and attempted to damage and destroy, by means of fire, a commercial building at 407 Airport Road in Endicott, New York, which building was used in interstate commerce and in activities affecting interstate commerce.

In violation of Title 18, United States Code, Sections 844(i) and 2.

COUNTS ELEVEN THROUGH SIXTEEN
(MAIL FRAUD)
A. SCHEME

In or about October 1998, and continuing up to the date of this indictment, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, knowingly and willfully devised and intended to devise a scheme and artifice to defraud the General Accident Insurance Company (and it's successors in interest CGU Insurance Company and OneBeacon Insurance) of approximately $323,713.10, by means of false and fraudulent pretenses, representations and promises, said defendant knowing at the time that such pretenses, representations and promises were false and fraudulent, which scheme and artifice is more fully described in Section B below.

B. WAYS AND MEANS

It was part of said scheme and artifice to defraud that **BRUCE H. MASON** caused a fraudulent claim to be submitted to General Accident Insurance Company for damages to property in connection with a fire which occurred at 407 Airport Road, Endicott, New York, on January 22, 1999. Such claim was fraudulent due to the fact that **BRUCE H. MASON** caused the fire to be set in order to have the insurance proceeds collected.

C. MAILINGS-COUNTS ELEVEN THROUGH SIXTEEN

On or about the dates set forth below, in the Northern District of New York, and elsewhere, the defendant, **BRUCE H. MASON**, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, placed and caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, and

knowingly caused to be delivered by mail according to the direction thereon, the items listed below at the locations listed below:

Count	Date	Description
11	1/12/99	Check payable to "General Accident" in the amount of $1,565.12 mailed to General Accident Insurance Company in Syracuse, New York, by the Steve Cardell Insurance Agency in Endwell, New York, after receiving the check that day from Bruce Mason.
12	1/28/99	Letter from John Dorner Adjustment Company in Johnson City, New York, to Bruce Mason in Binghamton, New York, enclosing a New York State Standard Fire Claim Form, Part 2, to be filled out in connection with the claim.
13	3/8/99	Letter from Bruce Mason in Binghamton, New York to Tom Apicelli of CGU Insurance Company in Syracuse, New York, attempting to expedite collection of the proceeds of the insurance policy.
14	3/19/99	Mailing from John Dorner Adjustment Company in Johnson City, New York to CGU Insurance Company in Syracuse, New York which included a signed copy of the New York State Standard Fire Claim Form, Part 2, which had been completed and signed by Judith Martino on March 13, 1999, and provided to the Dorner Adjustment Co. to be forwarded to the insurance company.
15	4/26/99	Proof of Loss and Inventory Form, signed by Judith Martino on April 26,

		1999, and received via the U.S. Mail by CGU Insurance Company in Syracuse, New York.
16	6/23/99	Letter from Bruce Mason to Richard Plochocki, Esq., attorney for CGU Insurance Company, attempting to expedite collection of the proceeds of the insurance policy.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT SEVENTEEN
(USE OF FIRE TO COMMIT FELONY)

On or about January 22, 1999, in the Northern District of New York, the defendant, **BRUCE H. MASON**, knowingly and willfully caused fire to be used at 407 Airport Road in Endicott, New York, to commit a felony prosecutable in a court of the United States, that is, mail fraud, as described in Counts 11 through 16, above.

In violation of Title 18, United States Code, Section 844(h) and 2.

A TRUE BILL,
S/Eugene R. Grey
Foreperson

JOSEPH A. PAVONE
United States Attorney
By: S/ Kevin P. Dooley
Kevin P. Dooley
Assistant U.S. Attorney
Bar Roll No. 302263

U. S. DISTRICT COURT- N.D. OF N.Y.
FILED SEP-5 2001
AT____O'CLOCK_____
Lawrence K. Baerman, Clerk - Binghamton

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

AFFIDAVIT
Criminal No. 01-CR-376
Hon. Thomas J. McAvoy

BRUCE H. MASON,
Defendant.

GOVERNMENT AFFIDAVIT IN OPPOSITION TO THE DEFENDANT'S RULE 33 MOTION

THOMAS P. WALSH, being duly sworn, deposes and states:

1. I am an Assistant United States Attorney in the Northern District of New York. Assistant United States Attorney Kevin P. Dooley is the attorney who was originally responsible for the prosecution of the case. AUSA Dooley is currently assigned on a special detail with the United States Department of Justice. Accordingly, I make this affidavit in opposition to the motion filed by Defendant for anew trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In connection with this affidavit in support of the government's memorandum in opposition to Defendant's Rule 33 motion, I have reviewed many materials underlying the trial of Defendant, Defendant's first Rule 33 motion, and Defendant's direct appeal. Those materials include, but are not limited to, review of portions of the trial transcript, pre-trial motions filed by Defendant, correspondence setting forth discovery material provided to Defendant, Defendant's pre-sentence report, the government's prosecution file, and decisions and orders of the Court concerning pre-trial, trial, and post-trial matters. In addition, I have corresponded with AUSA Dooley concerning

issues raised by Defendant in his current motion.

2. On October 28, 2002, following a bench trial which lasted approximately one month, Defendant Bruce Mason was convicted of fifteen of the seventeen counts contained in Indictment No. 01-CR-376 including, among other things, arson and bank fraud (check kiting).

3. By Decision and Order dated November 16, 2002, the Court denied Defendant's motion for a judgment of acquittal made pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

4. By Decision and Order Dated October 18, 2003, the court denied Defendant's first motion for a new trial based on Defendant's claim of newly discovered evidence made pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

5. Defendant's convictions were affirmed on direct appeal by decision of the Second Circuit Court of Appeals on December 17, 2004.

6. Additional facts will be set forth as necessary in the government's memorandum of law which is submitted in conjunction with this affidavit.

S/Thomas P. Walsh
THOMAS P. WALSH
ASSISTANT UNITED STATES ATTORNEY
Bar Roll No. 102777

Sworn to before me this
16th day of August, 2005
S/Kristin M. Fedish
Notary Public
Kristin M. Fedish
Notary Public, State of New York
Broome County
Commission #01FE6124636
My Commission Expires 3/28/09

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. **Criminal No. 01-CR-376**
Hon. Thomas J. McAvoy

BRUCE H. MASON,
Defendant.

GOVERNMENT'S SECOND AFFIDAVIT IN OPPOSITION TO THE DEFENDANT'S RULE 33 MOTION

THOMAS P. WALSH, being duly sworn, deposes and states:

1. I am an Assistant United States Attorney in the Northern District of New York. I make this affidavit in opposition to the motion filed by Defendant for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In addition, I make this affidavit in connection with this Court's Decision and Order dated August 17, 2005. The Decision and Order was issued in connection with Defendant's current Rule 33 motion.

2. In the August 17th Decision and Order, the Court directed the government to submit evidence concerning Gary Edison and, if conversations by Edison and Gage and Ferris took place, when and where the conversations took place.

3. In response to the Court's directive, the government has determined that Gary Edison was in federal custody and located at the Tioga County Jail continuously from July 19, 2002 through June 5, 2004 in connection with Edison's federal arson charge and conviction under Criminal Case No. 02-CR-268. The government requested Tioga County Jail officials to

review visitation logs for Gary Edison for the entire period Edison was incarcerated at the facility. Tioga County Jail records reveal three visits to Edison by Fred Gage: November 29, 2003; December 20, 2003; and, January 25, 2004.[1] In addition, visitation records indicated that David Ferris visited Edison with Fred Gage on January 25, 2004.

4. On August 23, 2005, the undersigned Assistant United States Attorney and Detective Sergeant Michael Kaminsky met and talked with Gary Edison at the United States Attorney's Office at the Federal Building in Binghamton. Edison was asked about this knowledge of and relationship with Fred Gage and David Ferris. Edison stated that he knew Fred Gage ad a financial consultant and also knew that Gage was an associate of Bruce Mason. Edison said he did not know David Ferris. Edison said that while Edison was in the Tioga County Jail a corrections officer told Edison that Gage wanted to visit Edison. Edison told the corrections officer that a visit from Gage would be alright with Edison. Edison stated that he was surprised that Gage wanted to visit Edison since Edison had not had any contact with Gage for a number of years. Edison stated that Gage visited him three times while Edison was in jail, and that on the last occasion Gage brought another male who Edison did not know and whose name Edison did not remember. Edison said that on each occasion that Gage visited they talked about a number of things but primarily about Bruce Mason and the arson of Mason's warehouse. Edison said that on each occasion that Gage visited Edison, Edison told Gage that he (Edison) was hired by Mason to start the fire at Mason's warehouse.

5. On December 28, 2002, following bench trial which lasted approximately one month, Defendant Bruce Mason was convicted of fifteen of the seventeen counts contained in Indictment No. 01-CR-376 including, among other things, arson and bank fraud (check kiting).

[1] Tioga County Facility Visitation Log Records are attached as **Exhibit A**.

6. By Decision and Order dated October 18, 2003, the Court denied Defendant's first motion for a new trial based on Defendant's claim of newly discovered evidence made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In that decision, *inter alia*, the Court wrote that "[t]he expert evidence on the cause and origin of the fire was not the centerpiece of the evidence against Mason. Rather, more compelling was the *testimony of Gary Edison that he was hired by Defendant to start the fire* coupled with the evidence that Defendant took steps to disable the security and fire prevention measures at the building." (emphasis added). Just over one month following the decision of the Court denying Defendant's first Rule 33 motion, Gage visited Edison for the first time. The last visit by Gage and Ferris to Edison was on January 25, 2004. Five days later on January 30, 2004, Edison was sentenced by the Court in connection with Edison's arson plea under case no. 02-CR-268.

S/Thomas P. Walsh
THOMAS P. WALSH
ASSISTANT UNITED STATES ATTORNEY
Bar Roll No. 102777

Sworn to before me this
13th day of September, 2005
S/Kristin M. Fedish
Notary Public
Kristin M. Fedish
Notary Public, State of New York
Broome County
Commission #01FE6124636
My Commission Expires 3/28/09

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
BRUCE H. MASON,
Petitioner,

-vs- 01-CR-376

UNITED STATES OF AMERICA,
Respondent.

Thomas J. McAvoy, U.S.D.J.

DECISION & ORDER

I. Introduction

Petitioner Bruce H. Mason has filed a motion pursuant to FED. R. CRIM. P. 33 to vacate his convictions and/or for a new trial on the ground of the discovery of new evidence.

II. Background

On October 28, 2002, following a bench trial, Petitioner was convicted on fifteen of the seventeen counts under which he was indicted, including arson and bank fraud. On September 23, 2003, Petitioner filed his first Rule 33 motion, claiming that he had discovered new expert reports that would alter his culpability. This Court denied that motion on October 20, 2003. In December of that year, Petitioner was sentenced to fifteen years imprisonment. The Second Circuit affirmed Petitioner's conviction on December 17, 2004. See United States v. Mason, 118 Fed. Appx. 544 (2d Cir. 2004).

Petitioner has brought a second Rule 33 motion, claiming that he has discovered new evidence regarding one of the government's witnesses and the conduct of the prosecutor. Petitioner had filed lengthy motion papers with the Court, alleging sixteen newly-discovered facts in support of his motion. These facts, however, can be condensed into two

issues: (1) whether one of the government's witnesses recanted his testimony; and (2) whether the government committed misconduct in its prosecution of Petitioner by making secret promises to a witness and suppressing evidence.

Petitioner claims that one of the government's witnesses, Gary Edison, recanted his testimony. According to Petitioner, while Edison was in prison serving several felony sentences, he told Fred Gage and David Ferris that neither Edison nor Petitioner committed arson, but that he (Edison) confessed to the crime (which, in turn, implicated Petitioner), to strike a deal with the government. Gage and Ferris each claim to be mere business acquaintances of both Petitioner and Edison. Petitioner claims that Edison's recantation of his testimony is supported by several facts, such as Edison's abuse of illegal drugs and the fact that, during Edison's state court proceedings, he had written a letter to the state court judge admitting that he makes false confessions.

Petitioner also claims that the victim of some of Edison's crims, David Kapur, stated that Edison admitted to Kapur that the government struck a deal with Edison whereby Edison would not be prosecuted for his crimes against Kapur due to his involvement with Petitioner's case. Kapur also states that he was initially unable to have state officials prosecute Edison for his crimes against Kapur because of the secret deal Edison had with the government. Kapur states in his affidavit that, before Petitioner's trial, he spoke to Edison and Edison informed him that Edison would not be prosecuted for the crimes Edison committed against Kapur due to Edison's cooperation with the government in Petitioner's case. Petitioner claims this secret deal is a violation of Brady v. Maryland, 373 U.S. 83 (1963). Petitioner also alleges that Edison and the government committed perjury, because both denied, at trial, that any promises had been made to Edison for his cooperation and that the government allowed Edison to falsely testify as to several facts regarding his past convictions, thereby suppressing

evidence from Petitioner.

III. Standard of Review

Rule 33 allows for the court to grant a new trial "if the interests of justice so require." FED R. CRIM. P. 33. If the trial was a bench trial, "the court may . . . vacate the judgment, take additional testimony, and direct the entry of a new judgment." Id. "A Rule 33 motion for a new trial based upon previously - undiscovered evidence is ordinarily not favored and should be granted only with great caution." United States v. Gallego, 191 F.3d 156, 161 (2d Cir. 1999) (Internal quotation marks and citations omitted). Generally, relief is only afforded if such "evidence could not have been discovered, exercising due diligence, before or during trial, and that evidence is so material and non-cumulative that its admission would probably lead to an acquittal." Id. The ultimate test is whether allowing Petitioner's verdict to stand would amount to a manifest injustice, due to a "real concern that an innocent person may have been convicted." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001).

A. Edison's Recantation

Petitioner claims that, because Edison has recanted his testimony, his Rule 33 motion should be granted. "Courts are particularly reluctant to grant such motions where the newly discovered evidence consists of a witness recantation as such recantations are looked upon with the utmost suspicion." United States v. DiPaolo, 835 F.2d 46, 49 (2d Cir. 1987) (citations and internal quotations marks omitted).

Here, there is insufficient evidence th at Edison has, in fact, recanted. Petitioner relies on the affidavits of two allegedly disinterested parties, Gage and Ferris. Both met state that Edison recanted his testimony to them while they visited Edison in prison. Gage first met with Edison, apparently at Edison's request, over a year after Edison entered prison and

only after Petitioner was found guilty by this Court and had filed his first Rule 33 motion. Furthermore, Gage and Ferris both expressly claim in their affidavits that, while they know both Petitioner and Edison, they have nothing more than a business relationship with the two. This raises serious questions as to why these are the people to whom Edison allegedly chose to recant. Given the circumstances of the visits to Edison and heightened scrutiny involved in the evaluation of any witness recantation, Edison's alleged recantation is dubious at best.[1]

Most damaging to Petitioner is the lack of an affidavit or any direct evidence that Edison actually recanted his testimony. "The failure of a defendant to produce or explain the absence of an affidavit of a recanting witness may be sufficient grounds for denying a motion for a new trial." Id. At 50 (citing United States v. Ward, 544 F.2d 975, 976 n. 2 (8th Cir. 1976) (per curiam)). Petitioner claims that, due to the fact that both he and Edison are in prison, it has been difficult to obtain an affidavit from Edison stating that he has recanted his testimony.[2] However, Petitioner's motion was first filed in June 2005 and Petitioner, with the assistance of his wife, has filed several supplemental memorandums in support of his motion. These lengthy document all have two central allegations: misconduct by the government and the recantation of Edison's testimony. It follows that such an important factor in Petitioner's motion would have, and should have, been demonstrated by now. Moreover, this Court purposefully

[1] Further doubt is cast on these allegations by the fact that Gage alleges to have visited Edison in prison in late 2003 and early 2004. Yet, Mason did not present this information to the Court until mid 2005 and Gage did not prepare his affidavit until January 2005. The same holds true for Ferris. Moreover, Petitioner has failed to identify any reason Gage or Ferris would have had for visiting Edison in jail.

[2] This contention is belied by the fact that Edison has been out of prison since approximately March 2005, before Petitioner filed the instant motion.

allowed Petitioner additional time to obtain an affidavit from Edison. To date, no such affidavit has been forthcoming. Because Petitioner has been given adequate time to produce an affidavit or statement from Edison stating that he has recanted his testimony, he cannot claim that Edison has recanted his testimony.[3]

B. Alleged Brady Violation

Petitioner claims that the government suppressed key information regarding Edison's prior convictions, thereby violating Brady v. Maryland, 373 U.S. 83 (1963). "[T]he Government's failure to disclose evidence that is materially favorable to the defense violates due process." United States v. Rivas, 377 F.3d 195, 199 (2d Cir. 2004) (citing Brady, 373 U.S. at 87). To violate Brady, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). "Impeachment evidence is evidence 'having the potential to alter the jury's assessment of the credibility of a significant prosecution witness.'" Rivas, 377 F.3d at 199 (quoting United States v. Avellino, 136 F.3d 249, 255 (2d Cir.1998)). To be material in the Brady analysis, the non-disclosure of the evidence must create "a reasonable likelihood that disclosure of the evidence would have affected the outcome of the case (citing United States v. Bagley, 473 U.S. 667, 682 (1985)), or would have put the case in such a different light as to undermine confidence in the outcome." Rivas, 377 F.3d at 199 (citing Kyles v. Whitley, 514 U.S. 419, 434-35 (1995).

[3] The Court further notes that there is evidence that Gage and Ferris visited Edison while he was incarcerated at the Tioga County Jail. The government contends, however, that it had a meeting with Edison on August 23, 2005 wherein Edison "said that on each occasion that Gage visited Edison, Edison told Gage that he (Edison) was hired by Mason to start the fire...."

Petitioner has failed to demonstrate a Brady violation. Petitioner's situation is much like that of the petitioners in United States v. Wong, 78 F.3d 73 (2d Cir. 1996). In Wong, the petitioners claimed that the government intentionally failed to disclose the testimony of one of the witnesses in a previous trial. Id. At 79. The testimony in question showed that the witness "received a tidy and regular income over a period of several years for serving as an informant, and . . . his cooperation in ongoing drug investigations may have earned him favorable treatment by the Immigration and Naturalization Service . . . ." Id. Although the government conceded that the transcripts should have been disclosed as Brady material, it argued that they were not material to the outcome of the trial because the petitioner's "credibility was called into question by the defense in cross-examination, and therefore that the further evidence eroding his credibility would have been merely cumulative." Id. The district court and the Second Circuit agreed, hold that "defense counsel had sufficient ammunition concerning [the witness'] mendacity, interest, and bias as to justify the . . .conclusion that the undisclosed impeachment evidence in the . . . transcripts was cumulative." Id. at 80.

Here also, Petitioner's counsel had enough information to call into question the validity and confidence of Edison's testimony, including his criminal history and his propensity to make false allegations, as evidence by the note Edison wrote to the state court judge. As in Wong, the fact that no information was proffered by the government regarding any alleged deal between Edison and either the United States government or the State of New York does not make this undisclosed impeachment evidence non-cumulative, because there were enough facts present at trial to call Edison's credibility into question. This Court was, and is, well aware of the many reasons to disbelieve Edison's testimony, including his criminal history. Accordingly, due to its cumulative nature, this cannot serve as a basis for Petitioner's motion and its alleged

suppression does not meet the standards imposed by Brady.

Furthermore, in denying Petitioner's first Rule 33 motion, this Court stated that it was not only Edison's testimony that was convincing, but also the other circumstantial evidence against Petitioner, including evidence that he had disabled the security and fire prevention measures at the building. Therefore, it is unlikely that further impeachment evidence would have altered this Court Decision.

Petitioner also argues that the government allowed Edison to proffer perjured testimony, which unduly influenced the court's decision. Once again, this issue is similar to Wong. In Wong, one of the petitioners claimed that the government knowingly allowed a witness to commit perjury when the witness claimed that he "'always did [his] tests," and had filed a tax return for 1988. Id. at 82. The petitioner claimed that the government knew, or should have know, that this was perjurious, because that witness had testified in previous trials that he had not paid any income tax in 1987. Id. The district court assumed that the government knew the testimony was perjurious when made, but still denied petitioner's motion. Id. at 81-82. The Second Circuit agreed, , holding that "[t]he additional evidence concerns a collateral issue [the witness' taxes], and 'd[oes] not refute any of [the witness'] testimony against' [the petitioner]." Id. at 82 (quoting United States v. Reyes, 49 F.3d 63, 68 (2d Cir. 1995)). Furthermore, the witness' testimony was adequately impeached at trial during cross-examination. Wong, 78 F.3d at 82. Therefore, the Second Circuit found that this new evidence "'is the sort of cumulative impeachment material that is routinely held insufficient to warrant a new trial,' (quoting Untied States v. White, 972 F.2d 16, 22 (2d Cir. 1992), cert. denied, 506 U.S. 1026 (1992)) because it does not 'undermine the confidence in the verdict.'" Id. (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

In the present action, even assuming that the

government knowingly sat idly by while Edison perjured himself at trial regarding his criminal past, such information was a collateral issue that did not impact Edison's testimony regarding Petitioner. At best, that testimony went to Edison's credibility, which could have been, and indeed was, attacked by Petitioner's counsel during cross-examination. Thus, this Court agrees with Wong, in that the testimony Petitioner believes was suppressed by allegedly allowing Edison to perjure himself at trial was cumulative in nature, and does not undermine the Court's confidence in the verdict.

Finally, Petitioner relies heavily on Giglio v. Untied States, 465 U.S. 150 (1972). Petitioner asserts that Giglio mandates a new trial here because it holds that new impeachment evidence is material in cases involving a single, uncorroborated witness. Giglio involved a situation where "the Government's case depended almost entirely on [the witness'] testimony," without which there would have been no indictment and no evidence to carry the case. Id. at 154. Here the government proffered other evidence implicating Petitioner, including physical evidence and other government witnesses. In addition, evidence that Petitioner took steps to disable the security and fire prevention measures for the building, which was referenced by this Court in Petitioner's first Rule 33 motion to be as important in its decision to find Petitioner guilty, also shows that Petitioner's guilt was not based entirely on Edison's testimony. Therefore, because Edison's testimony did not stand alone in proving Petitioner's guilt, Giglio is distinguishable.

C. Jury Waiver

Finally, Petitioner claims that, had the government disclosed all of the evidence Petitioner claims was suppressed, Petitioner would not have waived his right to a jury trial. Accordingly, Petitioner claims that his waiver of the right to a jury trial was invalid. Criminal defendants enjoy the right to a trial by jury under the United States Constitution. U.S.

CONST. amed. VI. Constitutional rights may be waived, BUT "'[a] waiver of a constitutional right must be voluntary, knowing and intelligent, that is, the act of waiver must be shown to have been done with awareness of its consequences.'" United States v. Candy, 126 F.2d 352, 359 (2d Cir. 1997) (quoting United States v. Morgan, 51 F.2d 1105, 1110 (2d Cir. 1995), cert. denied, 516 U.S. 861, 116 S. Ct. 171, 133 L.Ed.2d 112 (1995)); see also Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Given that a plea of guilty is "a waiver of [the] right to trial before a jury or a judge," analysis from the area of guilty pleas is helpful. Id.

In United States v. Ruiz, 536 U.S. 622 (2002), the United States Supreme Court was called on to determine whether the Sixth Amendment requires "federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" Id. at 625. The Court found that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')." Id. at 629 (emphasis in original). The Court realized that the more information a defendant has, "the more aware he is of the likely consequences of a . . . waiver . . , and the wiser that decision will likely be." Id. However, the government is not required by the Constitution to share all useful information with the defendant. Id. A waiver is "knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances - even though the defendant may not know the *specific detailed* consequences of invoking it." *Id.* (emphasis in original). The Supreme Court noted that "[i]t is particularly difficult to characterize impeachment information as critical

information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. This is because the value of impeachment information is random in helping out a criminal defendant, because the degree that such information will help the defendant depends on the defendant's knowledge of the government's case, which the Constitution does not require the government to disclose." Id. at 603.

Petitioner is only claiming that impeachment information regarding a single government witness would have altered his decision to waive his right to a jury trial. Given Ruiz and Brady, such information has little bearing on whether Petitioner's decision to waive his constitutional right was invalid. "[T]he Constitution . . does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver for various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Id. (defendant "misapprehended the quality of the State's case") (citing Brady, 397 U.S. at 757). Furthermore, Petitioner was afforded the advise of counsel on this matter and had a "full opportunity to assess the advantages and disadvantages" of a jury trial. Brady, 397 U.S. at 754. Several times, this Court questioned Petitioner whewther he understood the consequences of his decision, and if said consequences were explained to him by his counsel. Petitioner stated that he understood the consequences of his decision. This, coupled with the apparently competent representation at trial, demonstrates that Petitioner's waiver was knowing, intelligent, and voluntary, because he was aware of the consequences of his decision.

Finally, Petitioner's bases for this theory rests on several assertions, none of which are supported by any evidence, but instead on unsupported allegations and Edison's so-called recantation to third parties, which, as stated above, is dubious at best. Such conclusory allegations cannot show that his

waiver of a jury trial was not valid.

E. Motion to Produce and Preserve Evidence

Petitioner also has filed a motion to produce and preserve certain evidence, and has attached corresponding subpoena requests for such evidence. Most of these request involve information that is not newly-discovered evidence. The subpoena requests largely involve: 1) evidence to impeach Edison, which the Court has determined to be cumulative and not material; 2) evidence to show "secret dealing" by government, which, even if true, the Court has determined not be a Brady violation (see Wong, 78 F.3d at 79-80); and 3) evidence, such as bank and business records, that, with due diligence, Petitioner could have discovered before or during trial. Therefore, Petitioner's motion regarding these subpoenas is denied.

V. Conclusion

For the reasons stated above, Petitioner's motion pursuant to FED R. CRIM. P. 33 and his request for subpoenas are **DENIED**. The Clerk of the Court shall close the file in this matter. Any additional filings shall be treated as motion pursuant to 28 U.S.C. § 2255. In that regard, Defendant is advised to review 28 U.S.C. § 2255, the applicable time limits, and the limitations on second or successive motions.

Dated: October 20, 2005

S/Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge

UNITED STATES DISTRICT COURT
Northern District of New York

UNITED STATES OF AMERICA
V.
Bruce H. Mason

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)
Case Number 3:01CR00376-001
Calvin Domenico, 301 Black River
Rome, NY 13440 (315)336-1410
Defendant's Attorney

THE DEFENDANT:
X was found guilty on count(s) 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17 of the Indictment on October 30, 2002 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense
18 U.S.C. § 1344(1)	Bank Fraud
18 U.S.C. §§ 1341 & 2	Mail Fraud
18 U.S.C. §§ 1342 & 2	Use of Fictitious Name in Mail Fraud Scheme
18 U.S.C. §§ 1343 & 2	Wire Fraud
18 U.S.C. §§ 1341 & 2	Mail Fraud
18 U.S.C. §§ 844(i) & 2	Arson

X The defendant has been found not guilty on counts(s) 2 and 9 of the Indictment

December 5, 2003
Date of Imposition of Judgment

S/Thomas J. McAvoy
Signature of Judicial Officer
Hon. Thomas J. McAvoy, Senior U.S. District Judge
Name and Title of Judicial Officer

December 10, 2003
Date

U. S. DISTRICT COURT- N.D. OF N.Y.
FILED DEC-19 2003
AT ____ O'CLOCK_____
Lawrence K. Baerman, Clerk - Binghamton

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Count Nos.
18 U.S.C. §§ 1341 & 2	Mail Fraud	11
18 U.S.C. §§ 1341 & 2	Mail Fraud	12
18 U.S.C. §§ 1341 & 2	Mail Fraud	13
18 U.S.C. §§ 1341 & 2	Mail Fraud	14
18 U.S.C. §§ 1341 & 2	Mail Fraud	15
18 U.S.C. §§ 1341 & 2	Mail Fraud	16
18 U.S.C. §§ 844(h) & 2	Use of Fire to Commit a Felony	17

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **60 months on each of Counts 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16, all to be served concurrently to each other, and a term of 120 months on Count 17, to be served consecutively to the term of imprisonment imposed on each of the other counts of conviction. The total term of imprisonment is 180 months.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
BRUCE H. MASON,

Petitioner,

-vs- 01-CR-376

UNITED STATES OF AMERICA,

Respondent.

Thomas J. McAvoy, U.S.D.J.

DECISION & ORDER

..... The expert evidence on the cause and origin of the fire was not the centerpiece of the evidence against Mason. Rather, more compelling was the testimony of Gary Edison that he was hired by the Defendant to start the fire....

Dated: October 18, 2003.

S/Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge